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# RECORD.

## United States Court of Appeals
FOR THE EIGHTH CIRCUIT.

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No. 15,686.
CIVIL.

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MARTIN M. WICK,
APPELLANT,

vs.

JOSEPH KESHNER,
APPELLEE.

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI,
EASTERN DIVISION.

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In the District Court of the United States for the Eastern District of Missouri, Eastern Division.

Martin M. Wick, Plaintiff,

vs.

Joseph Keshner, Defendant.

Civil Action No. 9446 (3), Harper, J.

Complaint.

(Filed October 16, 1953.)

I.

For his first cause of action against the defendant, the plaintiff states:

1. Jurisdiction of this cause by this Court depends on diversity of citizenship. The plaintiff is a citizen of the State of Illinois. The defendant is a citizen of the State of Missouri. The matter in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00.

2. Defendant is and for a long period of time has been engaged in the business of breeding, raising, buying and selling beef cattle and other livestock, and defendant has for a long period of time been and held himself out as, and is now and does now hold himself out as, an expert in the valuation, breeding, raising, buying and selling of beef cattle and other livestock. Defendant owns and operates an extensive farm or ranch for the breeding, raising, buying and selling of beef cattle at or near New Florence, Missouri, known as the "Good Earth Stock Farm." Defendant widely advertises said farm as an enterprise where highly valuable beef cattle are bred, raised and kept, and widely advertises himself as a breeder, raiser, buyer and seller of highly valuable beef cattle. Such advertising was done and circulated prior to the facts hereinafter in this complaint alleged.

3. Plaintiff is and has been a manufacturer, and prior to the transactions in this complaint described had no experience or learning in the business of breeding, raising, buying and selling of beef cattle or other livestock, and was without any knowledge of the care, breeding, raising, buying, selling, value or worth of beef cattle and other livestock. The facts in this Paragraph 3 alleged were at all times mentioned in this complaint known to the defendant.

4. In the latter part of the year 1951 and the early part of the year 1952 the plaintiff and defendant became acquainted, and discussed the investment of the sum of approximately $15,000.00, accumulated as a saving by the plaintiff, in the business of beef cattle raising operated by the defendant. The defendant at such time (and prior to the investment of any moneys by the plaintiff) represented himself to the plaintiff as skilled and experienced in such business, as earning approximately 25% per annum on his investment in such business and as earning a like return for others who had invested, and further represented to plaintiff that if he, plaintiff, would invest a like return would be forthcoming to him. Defendant further represented to plaintiff at such time (and before the investment of any moneys by plaintiff) that several persons of wealth and prominence had invested with him, and that he was anxious to expand his clientele to include persons not engaged in agricultural pursuits, such as the plaintiff; that the manner of investment was for the investor to give him, the defendant, a certain sum of money, whereupon he, the defendant, would either purchase animals for the investor or segregate animals from his, the defendant's, herds for the investor, and that thereafter the defendant would keep, feed and maintain such animals on his stock farm, breeding them and crediting the investor with the progeny. Defendant further represented to plaintiff at such time (and before the investment of any moneys by the plaintiff) that the profit and income on the investment made would be yielded by the sale of the progeny and by the sale and replacement, from time to time, of other members of the herd; that he, the defendant, was highly skilled at the art of buying and selling beef cattle, and that by reason of his skill the investment would be

without risk of loss; that profit and income on an investment with him would be forthcoming when the herd allotted to the investor approximated 30 in number; that the cost of keeping, feeding, breeding and maintaining animals allotted to an investor would not exceed $200.00 per year per head, and that the initial costs of keeping, feeding, breeding and maintaining would be carried by him, the defendant, until the investment had attained a profitable status by reason of the production of progeny and the sale thereof; that the investor would have no duty or obligation with respect to the physical keeping of the animals but that such keeping would be done on the defendant's stock farm. Defendant further represented to the plaintiff at such time (and before the investment of any moneys by plaintiff) that he was familiar with plaintiff's reputation and standing as a resident and citizen of the community of Highland, Illinois; that such community was peopled by a number of persons who might be interested in investing in beef cattle; that he, the defendant, was anxious to expand his clientele to the community of Highland, and was anxious to number the plaintiff among his clients; that he, the defendant, knew of the ignorance of the plaintiff respecting cattle and livestock, but that if plaintiff invested with him, he, the defendant, would personally allot to him, the plaintiff, from the defendant's herds, at a price of $1,000.00 per head, cattle which had an actual true value of $2,000.00 per head; that he, the defendant, would make the sacrifice so indicated for the purpose of including the plaintiff among his investors and increasing his clientele; that the value of beef cattle was related to two factors primarily, their pedigrees and their ages, and that to assure the plaintiff's investment, if made, he, the defendant, would allot to plaintiff cattle described as heifers and young matrons, not over two years of age, with pedigrees fully warranting the sum total of the investment; and that the plaintiff should repose perfect and complete trust and confidence in him, the defendant, for the allotment of animals to indicate his investment and for the care of such animals and the profitable management of plaintiff's investment, if made.

5. By reason of the statements and representations made to plaintiff by defendant, as alleged in Paragraph 4

hereof, plaintiff was induced to and did deliver and pay over to the defendant the sum of $15,000.00, and defendant took and received and appropriated such sum of $15,000.00.

6. The payment by plaintiff to the defendant of the sum of $15,000.00, as hereinbefore alleged, by reason of the statements, representations and inducements made by the defendant, as hereinbefore alleged, operated to and did make the defendant the trustee and fiduciary of the plaintiff, and the confidential custodian of the money so paid to him, and operated to and did impose upon the defendant the duty and obligation strictly to carry out and perform the representations and inducements made and the duty and obligation to exercise the utmost good faith in his, the defendant's, use and employment of the said money.

7. But the defendant, disregarding his duty and obligation as aforesaid, did not strictly carry out and perform the representation and inducements made and did not exercise good faith in the use and employment of the money paid him by plaintiff. Initially, the defendant failed and refused to allot any animals from his herds to the plaintiff; upon the plaintiff's demand to be shown animals allotted to him, the defendant segregated 15 cows from his herds, but one was in excess of 11 years of age, one was in excess of nine years of age, four were in excess of eight years of age and three were in excess of seven years of age, and had a pedigree or other characteristic which would make the average value of the allotted animals $2,000.00 per head, as represented by defendant to induce plaintiff to invest, or would make the total value of the allotted animals $15,000.00, to equal the amount of money paid defendant by plaintiff. Said animals allotted to plaintiff by defendant had, in truth and in fact, been purchased by defendant prior to their allotment to plaintiff at an average price of less than $300.00 per head, and were of a true and actual value of not more than $300.00 per head, and such true and actual value was known to the defendant.

8. Prior to the investment of any moneys by the plaintiff, and as an added inducement to the plaintiff to pay over to the defendant the sum of $15,000.00, the defendant stated and represented to the plaintiff that it was the

uniform practice of him, the defendant, to offer to return to investors or purchasers the money invested or paid in the event of dissatisfaction on the part of such investors or purchasers; that he, the defendant, had never experienced dissatisfaction on the part of investors or purchasers, and had never been required to refund moneys; but that if the plaintiff were at any time dissatisfied with his investment, if made, he, the defendant, would refund his investment in toto.

9. Upon learning of the ages and characteristics of the animals which had been allotted to him, and of their actual value, plaintiff became dubious of the transaction and of the true and actual intentions of the defendant in respect thereof, and became fearful of the safety of his investment, and he thereupon requested of the defendant the return of his money. The defendant, however, did not return the investment made by the plaintiff, but instead billed the plaintiff for two animals which the plaintiff had never purchased. The plaintiff thereupon again requested the return of the investment made by him, but upon such second request the defendant ordered the plaintiff to remove from the defendant's property the animals which the defendant had allotted to the plaintiff, although the defendant knew that the plaintiff was without resources or property to keep and maintain them. Thereafter the defendant began to bill the plaintiff for feed, maintenance and breeding of the animals, finally instituting legal proceedings before a magistrate of the County of Montgomery in the State of Missouri for sale of the animals for feed, maintenance and breeding charges.

10. Plaintiff has at no time acquiesced in the allotment of cattle made to him or for his account by the defendant, but has at all times repudiated it and demanded the return of his investment.

11. By reason of defendant's office as a fiduciary, trustee or confidential custodian of the money paid him by plaintiff, and by reason of defendant's misapplication of such money and violation of the terms and conditions of its payment to him, said terms and conditions arising from the representations and statements of the defendant made to induce the payment by the plaintiff, defendant has be-

come liable to the plaintiff for the return of the money paid him by the plaintiff, with interest thereon at the lawful rate.

12. Defendant did not intend to perform and comply with the representations made to plaintiff to induce plaintiff to pay over and invest with him the sum of $15,000.00, but, on the contrary, affirmatively intended not to perform and comply with such representations, and the entire transaction was a conscious and deliberate effort to obtain from plaintiff the said sum of money without giving him value in return; such effort, being conscious and deliberate was willful and malicious, and as a punishment to the defendant, and a warning and deterrent to others, this Court should award the plaintiff punitive or exemplary damages against the defendant.

Wherefore, the premises considered, plaintiff prays judgment against the defendant awarding him the return of $15,000.00 paid to defendant by plaintiff, with interest at the rate of 5% per annum from the date of payment to the date of such judgment, and in addition awarding him, the plaintiff, as punitive or exemplary damages against the defendant the additional sum of $15,000.00, and for his costs.

II.

For his second cause of action against the defendant, the plaintiff—

1. Repeats and re-alleges by reference Paragraphs 1, 2, 3, 4, 5 and 8 of his first cause of action, and further states:

2. The representations, statements and inducements by the defendant to the plaintiff as alleged constituted and were an offer by the defendant to contract with the plaintiff upon such representations, statements and inducements as terms; and the plaintiff, by paying over to and investing with the defendant the sum of $15,000.00 accepted such offer and made and entered into such contract.

3. The defendant, disregarding his obligations under such contract, initially failed and refused to allot any animals from his herds to the plaintiff; upon the plaintiff's

demand to be shown animals allotted to him, the defendant segregated 15 cows, but one was in excess of 11 years of age, one was in excess of nine years of age, four were in excess of eight years of age and three were in excess of seven years of age, and none had a pedigree or other characteristic which would make the average value of the allotted animals $2,000.00 per head, as agreed by defendant, or would make th total value of the allotted animals $15,000.00, to equal the amount of money paid defendant by plaintiff. Said animals had, in truth and in fact, been purchased by defendant prior to their allotment to plaintiff at an average price of less than $300.00 per head, and were of a true and actual value of not more than $300.00 per head, and such true and actual value was known to the defendant.

4. By reason of the foregoing, the defendant breached his contract with the plaintiff, and such breach has damaged the plaintiff in the sum of $15,000.00, the amount invested by the plaintiff with the defendant, which has now become lost to the plaintiff.

5. And plaintiff now repeats and realleges by reference Paragraph 12 of his first cause of action.

Wherefore, the premises considered, plaintiff prays judgment against the defendant for actual damages in the sum of $15,000.00, and in addition punitive or exemplary damages in the sum of $15,000.00, and for his costs.

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## Amended Answer to Count I.

(Filed February 21, 1953.)

### First Defense.

The complainant fails to state a claim against defendant upon which relief can be granted.

### Second Defense.

Plaintiff had notice of all the facts and of all the acts of the defendant set forth in the complaint, and nevertheless, refrained from commencing this action until October 15, 1953, and has thereby been guilty of such laches as should in equity bar the plaintiff from maintaining this action.

### Third Defense.

Further answering the claim stated in Count I of plaintiff's petition:

1. Defendant admits each and every allegation in paragraph 1.

2. Defendant admits each and every allegation in paragraph 2.

3. Defendant is without knowledge or information sufficient to form a belief as to the averments in paragraph 3, and therefore denies each and every allegation therein contained.

4. Defendant admits that he became acquainted with plaintiff prior to the year 1952, at which time plaintiff mentioned that he would like to purchase some cattle as an investment, and that he did not have a farm at that time on which to place these cattle, but contemplated the purchase of a farm on which the pure bred cattle could be maintained. Plaintiff, defendant, and one of plaintiff's employees who was and had been for a long time an owner and breeder of pure bred Angus cattle, attended the sale in Oklahoma, at which time the three of them purchased a registered female Angus for the sum of $3,000.00, with the understanding that each of the parties would take a one-

third interest in the animal, which would be left at the defendant's farm for the time being. After that time, plaintiff signified an interest in the purchase of more cattle, and later visited the farm of the defendant with the purpose to purchase additional registered Aberdeen Angus cattle. Defendant advised plaintiff that he had sold registered Aberdeen Angus cattle to a purchaser who did not have a farm, and defendant advised plaintiff the basis on which the cattle were left on defendant's farm for the other purchaser, and further admits that he told plaintiff that the cost of keeping, feeding, breeding and maintaining animals by the month would not exceed on the average $200,00 per year per head, until plaintiff could locate a farm and move the cattle; that defendant showed cattle to the plaintiff, and advised plaintiff that he would sell him fifteen head from the group at $1,000.00 per head, and that on February 9, 1952, plaintiff purchased fifteen head from the group for that price, and paid for them; that plaintiff on occasions during the year 1952, visited defendant's farm, discussed "his" cattle, looked at farms to purchase in the community in which the defendant lives, brought his friends to defendant's farm and showed "his" cattle to them, and showed prospective farms to his friends. Defendant denies all allegations of Paragraph 4, except as herein specifically admitted.

5. Defendant denies each and every allegation contained in paragraph 5, and further alleges that plaintiff did deliver and pay over to the defendant the sum of $16,000.00, representing $15,000.00 for the fifteen head of registered Angus bred females purchased from the defendant, and $1,000.00 for the one-third interest in the animal purchased at the sale in Oklahoma, as hereinbefore alleged.

6. Defendant denies each and every allegation contained in paragraph 6.

7. Defendant alleges that six registered Aberdeen Angus heifers, lot or chain numbers 113, 116, 117, 118, 119 and 120, and nine cows, lot or chain numbers 121, 123, 124, 125, 126, 127, 128, 129 and 130, were selected from his herd for the plaintiff and later segregated from his herds and the registration papers on each of said animals transferred to

the name of the plaintiff in the office of the American Aberdeen Angus Association. Defendant denies each and every other allegation contained in paragraph 7 not admitted herein.

8. Defendant denies each and every allegation contained in paragraph 8.

9. Defendant further alleges that after plaintiff had visited the defendant's place and seen and shown his friends "his" cattle and had considered the purchase of different farms in that community, and after the drop in the price of cattle, plaintiff did request of the defendant the return of his money, which defendant refused to do. Defendant denies that he billed plaintiff for two animals which plaintiff had never purchased, and alleges that he billed plaintiff for three animals sold at defendant's public auction in September, 1952, and that plaintiff stated that he would pay for one of the animals, which he has never done, but that he would not pay for the other animals. Defendant further alleges that he advised plaintiff that he, defendant, had a purchaser for some of the calves produced by plaintiff's cows, and asked plaintiff for a price on said calves, and that plaintiff refused to put a price on said calves so that defendant could proceed to sell the same, although said calves were registered in the name of the plaintiff, who well knew that defendant could not sell or transfer the calves as pure bred calves without the authorization and signature on the transfer of the registration papers, all of which plaintiff refused to do. Defendant further alleges that after plaintiff refused to sell the offspring from the cows purchased, defendant requested at various times thereafter plaintiff to pay for feed, maintenance and breeding of the animals, or to proceed to purchase his farm or get a place to keep the animals purchased, which plaintiff refused to do, and thereafter defendant finally instituted legal proceedings before a Magistrate of the County of Montgomery in the State of Missouri, for the sale of the animals for feed, maintenance and breeding charges. Defendant denies each and every allegation contained in paragraph 9, except as herein specifically admitted.

10. Defendant denies each and every allegation contained in paragraph 10.

11. Defendant denies each and every allegation contained in paragraph 11.

12. Defendant denies each and every allegation contained in paragraph 12.

Fourth Defense.

For his fourth defense to Count I of plaintiff's petition, this defendant states that on or about August 10, 1953, after the plaintiff in this action had refused to sell any of the offspring or to pay for the feed, maintenance and boarding of the animals up to that time, the defendant filed, in the Magistrate Court in and for Montgomery County, State of Missouri, before O. A. Kamp, Magistrate, an action entitled, "Joseph Keshner, Plaintiff, vs. Martin M. Wick, Defendant"; that the petition in said case before said Magistrate was for an agister's lien in the sum of $6,231.50, for the keeping, boarding, feeding, caring for and training, at the request of the defendant, Martin M. Wick, of certain described animals, being the same fifteen cows purchased from the defendant, Joseph Keshner, by Martin M. Wick at the time mentioned in plaintiff's petition in this case, No. 9446, in the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, said petition in said Magistrate Court case giving the names, year of birth, register number, tattoo, and chain number of said fifteen cows; that said petition in said Magistrate Court action also listed fifteen calves which had been born to said fifteen cows in 1952, giving the sex, date of birth, name, and chain number of the calf in each case, stating that two of said calves had died; that in said Magistrate Court action the said Joseph Keshner set forth the cost of the labor, feed, care, mineral, salt, training and keep of said cows and calves as the property of the said Martin M. Wick, from February 9, 1952, to August 9, 1953, the total of said account for said purposes being $6,231.50, which was alleged to be due and owing to the said Joseph Keshner from said Martin M. Wick as the owner of said cows and calves;

that service in said Magistrate action was had upon the said Martin M. Wick by publication of notice of such action for one week in the Montgomery Standard, a weekly newspaper of Montgomery County, Missouri, and proof of publication of said notice duly filed in said cause; that in addition to the notice of publication, aforesaid, the Court further ordered that the defendant, as a non-resident, be further notified by the mailing of a copy of the petition and a copy of the order of publication, by registered mail, to the defendant, Martin M. Wick, at Highland, Illinois, which copy of the petition and order of publication was received by the said Martin M. Wick and receipted for by him, and the said Martin M. Wick had full notice of the pendency of such action, but made no defense thereto, and after due service, and after the return date of said order of publication, to wit, on or about the 26th day of February, 1953, said Magistrate heard said cause, the defendant, Martin M. Wick, making default, and there was a finding and judgment for the said Joseph Keshner against the said Martin M. Wick in said sum of $6,231.50 and costs; that said agister's lien suit and judgment is res judicata and a bar to the claim of the plaintiff, Martin M. Wick, herein that he was not the owner of said cows and had not accepted them, and this defendant, Joseph Keshner, sets up and pleads said judgment as a final adjudication of the ownership of said cows, and a bar to this action; and that all of said animals were sold by the Court all to satisfy said judgment.

Wherefore, defendant prays that Count I of plaintiff's petition be dismissed, and that defendant have and recover his costs in this behalf expended.

Amended Answer to Count II.

Defendant, for his answer to the claim set out in Count II of plaintiff's petition,

1. Repeats and alleges as part of the answer to plaintiff's second claim, each and all of the allegations contained in defendant's first and second defense, and each and all of the allegations contained in paragraphs 1, 2, 3, 4, 5, 7, 8 and 9 of defendant's answer to Count I of the complaint, with like effect as if herein fully repeated.

2. Admits that he offered to sell to the plaintiff the fifteen cows, and that the plaintiff accepted the offer and purchased and paid for the fifteen cows by the payment of $15,000.00, as inferred and alleged in paragraph 2, and as more particularly set out herein by reference, but defendant denies each and every other allegation and inference contained in paragraph 2.

3. Defendant denies each and every allegation contained in paragraph 3.

4. Defendant denies each and every allegation contained in paragraph 4.

5. Defendant denies each and every allegation contained in paragraph 5.

6. Defendant repeats and realleges as part of the answer to Count II of plaintiff's petition each and all of the allegations contained in the fourth defense to Count I, as fully as if the same were herein fully set forth.

Wherefore, defendant prays that Count II of plaintiff's petition be dismissed, and that defendant have and recover his costs in this behalf expended.

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Trial.

Transcript of proceedings at trial filed October 19, 1956, in the office of the Clerk of the District Court. Olive Poole, Reporter. In the narrative of testimony following, references to pages of the transcript are made by the abbreviation "Tr." followed by the page number.

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## Plaintiff's Case.

Thereupon, to sustain the issues in his behalf, plaintiff offered the following evidence:

### JOSEPH KESHNER,

the defendant, called by the plaintiff for adverse examination under Rule 43 (b), testified as follows:

### Direct Examination, by Mr. Baetz.

My name is Joseph Keshner; I live at New Florence, Mo.; I am the defendant. I operate a stock farm known as the "Good Earth Stock Farm." I specialize in the raising of cattle; I breed and sell them (Tr. 8). I have been in the cattle business since 1918; I now specialize in the Aberdeen-Angus breed, and have done so about 15 years.

I know Martin M. Wick, the plaintiff; I met him in Chicago, at the International Live Stock Show, in November or December of 1951 (Tr. 9). I next saw him when he and Mary Lou O'Haran and I went down to a sale at Miami, Okla., in January of 1952 (Tr. 10). We didn't talk about the purchase of cattle by Wick from me on the trip, but we did later. I guess we talked about it on the way back, and when we got back at Good Earth Farm (Tr. 11). I was going to sell him cattle, and he was going to buy them from me. He was interested; we had bought one down at Oklahoma (Tr. 12). I couldn't say whether he knew anything about the cattle business (Tr. 13). He asked me if it was a good business to be in. I would say it was; a good many people were in it. I did not tell him the profits I was making.

He agreed to give me $1000 a head for bred cows and calves (Tr. 14). This was the conversation at my farm when we returned from Oklahoma in January of 1952. He did not give me $15,000 then; he came back February 9 and gave it to me (Tr. 15). When he came back then he bought the 15 head of cattle. We talked further about it before he gave me the money. I did not tell him my practice was to refund money to any purchaser who was dissatisfied, and I did not tell him that in his case I would refund the money to him if he were dissatisfied.

Plaintiff's Exhibit 1.

Check for $15,000.00 drawn by Martin Wick in favor of Joseph Keshner on the Highland National Bank, Highland, Ill., under date February 9, 1952. On its face is written: "15 bred co vs." It is endorsed by Keshner and Good Earth Stock Farm and is perforated to show payment February 13, 1952.

---

Plaintiff's Exhibit 1 is the check Wick gave me (Tr. 16). I don't know who wrote the words "15 bred cows" on it; it co'd be my wife; she takes care of the books.

I showed Wick the 15 cows I was selling him at or before the time the check was delivered.

Q. Did you show them to him individually or did you point out a large herd of animals and say, "Yours is among those"?

A. No, they have neck chains and we had the numbers, and I showed him the neck chains which corresponds to the numbers that I picked out for him.

I gave him a bill of sale (Tr. 17).

---

Plaintiff's Exhibit 2.

Statement.

For: Martin Wick, Highland, Illinois

15 head of registered Aberdeen Angus cattle bred to Prince Eric of G. E. 5th, 1131250 at $1,000.00 per head or a total of $15,000.00. Cattle to be kept at Good Earth Stock Farm for a nominal fee per year until Mr. Wick is ready to move them.

| | | | |
|---|---|---|---|
| 6 heifers | Lot 113 | 9 cows: | Lot 121 |
| | Lot 116 | | " 123 |
| | Lot 117 | | " 124 |
| | Lot 118 | | " 125 |
| | Lot 119 | | " 126 (122) |
| | Lot 120 | | " 127 |
| | | | " 128 |
| | | | " 129 |
| | | | " 150 |

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Plaintiff's Exhibit 2 is a copy of what I refer to as a bill of sale; it is a copy of the document I handed him (Tr. 18). The copy is not signed or dated, but the original was. On the exhibit, the animals are shown as "lots"; with each lot having a number. The numbers on the metal tags suspended around the animals' necks by chains corresponded.

The animals also have tattoo numbers in their ears (Tr. 19). The chain numbers can be slipped on and off the animals' necks with ease; the tattoo numbers are printed in the ears with indelible ink. There was no reason why I used the chain numbers instead of the tattoo numbers.

(Tr. 20). The animals I sold Wick were in with a herd I sold previously to one Voight; they were known as the Ellis herd. But they were identified as Wick's cows; there was no question about what Wick's cows were. We didn't have to do any further sorting or anything like that. It was done, and I regarded them as Wick's cows from that time on.

In about March my wife and I went to Hawaii on a business and vacation trip (Tr. 21). We were there three or four months.

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Plaintiff's Exhibit 3.

[Plaintiff's Exhibit 3 is a letter on the letterhead of the Islander Hotel, Honolulu, Hawaii, to Martin Wick, signed "Confucius Joe," and dated April 29, 1952. Since the relevant portion is set out in the narrative, below, it is not reproduced in extenso here.]

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We conduct our farm with a Chinese advertising motif; we call it the Good Earth Farm after the novel by Pearl Buck (Tr. 22). In our advertising, I am referred to as "Confucius Joe," and I sign my letters that way. My wife, Katherine, is known as "Kiki." I have read the letter marked Plaintiff's Exhibit 3; I think my wife signed it with my name, "Confucius Joe." She signs the letters and checks and does the book work.

The letter is dated April 29, 1952. The third paragraph of it is as follows:

(Tr. 23) "When I get home you come up to the farm and we will get any information you desire with reference to your cattle as I told Clint we would take care of sorting your cattle when I got home so that is why he couldn't give you any information when you stopped at the farm."

The "Clint" referred to is Clint Hollomon, my farm manager. What I meant by "sorting" in the letter is that if any did not conceive, I would give Wick another animal.

None of the cows failed to conceive.

(Tr. 24) All the cattle allotted to Wick were animals registered with the American Aberdeen-Angus Breeders Association. This association issues certificates showing the ages, numbers and transfers of animals. The October after the sale I sent Wick the certificates of the animals allotted to him.

---

Plaintiff's Exhibits 4-A to 4-O, inclusive, are certificates of registration issued by the American Aberdeen-Angus Breeders' Association, Chicago, covering the 15 cows allotted to Wick. Exhibit 4-A is in words and figures as follows:

[Obverse]

American Aberdeen-Angus
Breeders Ass'n
Chicago 9, Illinois 563197

This Certifies that the Cow calved April 27, 1939, Named Lady Evona 39" Tattoo Left Ear (Blank) Right ear (blank) Ear Tag 44 Sire Prince Marshall T. F. No. 499929 Dam Evona Mayfloer 2" No. 507712 Bred by J. P. Ellis, New Florence, Mo. First owner J. P. Ellis, New Florence, Mo. Was recorded June 26, 1939, in the American Aberdeen-Angus Her Book. (Signed) W. T. Tomhave Secretary

[Reverse]

Transfer Record and Certificate for the Within Registered Angus.

The last name entered hereunder is the present owner as shown by records in Angus office.

| When Sold Date of Delivery | Service Date No. of Bull | Name and Address of Owner Shown by Transfer Record | Attest by the Secretary |
|---|---|---|---|
| 1-31-51 | Pasture 728931 | Good Earth Stock Farms, New Florence, Mo. | Frank Richards |
| 7-23-52 | Pasture 1066245 | Martin Wicks, Highland, Ill. | Frank Richards |

Exhibits 4-B to 4-O are identical, except that different cows, with different numbers, are shown. All exhibits show the sale date and date of delivery to Wick from Keshner (Good Earth) to have been July 23, 1952. Of the 15 exhibits covering the 15 cows, only four (4-J, 4-E, 4-D and 4-C) show service by Prince Eric G. E. 5th, whose number is 1131250. The individual numbers of the certificates and of the cows represented are shown in Plaintiff's Exhibit 20, which also sets out the cows' names.

Exhibits 4-B to 4-O are not set out here in extenso in the interest of conservation of space.

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Plaintiff's Exhibits 4-A to 4-O are the certificates sent to Wick. The transfer to him is shown on the backs of the certificates. The information on the backs is made up from information furnished by me to the association (Tr. 26).

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Plaintiff's Exhibits 5-A to 5-K.

Plaintiff's Exhibits 5-A to 5-K are certificates of the American Aberdeen-Angus Breeders' Association, on forms identical with that set out as Plaintiff's Exhibit 4-A. They purport to cover 11 calves born to 11 of the cows covered by Exhibits 4-A to 4-O, after the purported allotment of the cows to Wick. Each of the 11 calf certificates purports to show that the sire of the calf was Prince Eric G. E. 5th, No. 1131250; but a comparison of them with the applicable cow certificate (Exhibits 4-A to 4-O) shows that nowhere has Prince Eric G. E. 5th been listed as the service bull. Because the discrepancy was virtually conceded during the trial (see the cross-examination of defendant's witness Hollomon, infra), the individual certificates of the calves are not set out here in extenso.

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Plaintiff's Exhibits 5-A to 5-K are certificates of the association covering 11 calves born to 11 of the cattle allotted to Wick (Tr. 27).

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Plaintiff's Exhibit 6.

[The nature of Plaintiff's Exhibit 6 is set out in the narrative, and it is therefore not reproduced in extenso here.]

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Plaintiff's Exhibit 6 is a registered mail envelope, postmarked Bellflower, Mo., October 11, 1952, from Good Earth Farm to Martin M. Wick. This was approximately the date the cow and calf certificates were mailed to Wick. Plaintiff's Exhibits 5-A to 5-K, the calf certificates, were issued by the association from information given by us.

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Plaintiff's Exhibit 7.

[The nature and content of Plaintiff's Exhibit 7 are shown in the narrative, and it is therefore not reproduced in extenso here.]

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Plaintiff's Exhibit 7 is a stub book for applications for entries from Good Earth to the association. The stubs here were made out by my wife. They show the breeder of the calves was Good Earth, and there are ditto marks showing the owner was Good Earth.

[At this point the witness was temporarily excused from the stand to accommodate a defendant's witness, Frank H. Richards, and permit him to testify out of turn. The testimony of Mr. Richards is narrated, infra, as part of the defendant's case. The testimony of the defendant Keshner is now resumed.]

(Tr. 68) I have compared the stubs in the stub book, Exhibit 7, with the calf certificates, Exhibits 5-A to 5-K, and they are the same (Tr. 69). The calves were registered in Good Earth. We owned the cows up to the time

of transfer. They were sold to Wick in February; I didn't consider myself the owner after February 9.

---

Plaintiff's Exhibit 8.

[The nature of Plaintiff's Exhibit 8 is set out in the narrative, and it is therefore not reproduced in extenso here.]

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(Tr. 70) Plaintiff's Exhibit 8, an envelope addressed from American Aberdeen-Angus Breeders' Association to Good Earth Stock Farm, postmarked August 7, 1952, shows the time the certificates were sent from the association to me. This means I held the certificates for two months, from August 8 to October 11. I finally sent them to Wick because he asked for them (Tr. 72). No, he did not ask for them. I wouldn't say that the truth of the matter was that I sent the certificates to him because he wrote me he would not acknowledge the sale, and I wouldn't say that is why I sent them over to him.

---

Plaintiff's Exhibit 9.

Highland, Ill.,
September 24, 1952

Mr. Joe Keshner,
c/o Good Earth Stock Farm,
New Florence, Missouri.

Dear Joe:

I did not like to bother you at the time of your sale as I know you were very busy. On the day of the sale I had an opportunity to look at the animals that are supposedly the ones to be set aside for me. I cannot tell you how disappointed and actually ashamed I was to show these to the people I had with me. I do not feel they are worth the investment as I naturally expected for the price charged, top quality, a good pedigree and a good individual.

I feel in view of what I saw that it will be best for you to make a refund.

I feel certain that if these cattle are as good as you indicated to me that they are you will be very happy to keep them in your herd.

Awaiting your reply I am

Sincerely yours,

MARTIN M. WICK,
Highland, Illinois.

---

(Tr. 73) Plaintiff's Exhibit 9 is a letter from Wick which I received September 25, 1952. There is no request in it for the certificates (Tr. 74). I got no other letter asking for them. I got no telephone call asking for them (Tr. 75).

Q. Mr. Keshner, did you answer that letter of September 24 that Wick sent you, asking for his money back?

A. Not unless you have it.

The Court: Well, now, if you don't know, just say so (Tr. 76). That is like saying "I'm telling the truth unless you can prove I'm lying."

The Witness: Joe don't lie.

Q. Did you respond to that by sending Wick a bill for another three cows? A. He bought three cows at the sale.

Q. Try and listen to my question. Whether he bought three cows from you or not, did you respond to the letter by sending him a bill for an additional three cows?

A. We sent out statements after the sale and billed him for cows that he had purchased.

Q. Well, Mr. Keshner, the very next day after you got this letter, or a few days after it, not the next day, two days after it, it is true, is it not, as a matter of fact, that you sent Wick a bill for buying three more cows at your auction sale, and concurrently a letter congratulating him on the purchase, but didn't say a word about his demand for his money back, isn't that true?

A. We always congratulate people who buy our cattle.

---

Plaintiff's Exhibit 10-A.

Good Earth Stock Farm,
September 28, 1952

Mr. Martin Wick
Highland, Illinois

Dear Martin:

This message is, purely, a greeting from one friend to another. If it were not for folks of your caliber, Keiki, Joe and Good Earth would not have made the progress they have. When we say "Thank you" it comes from the bottom of our hearts.

Good Luck, Martin, with your purchases of lot 11, 25 and 29 and may success and fortune be yours.

Do come to visit us real soon at Good Earth as we love to have our friends with us. Keiki joins me in sending our sincere Aloha and warmest regards to you and shall look forward to seeing you soon.

Your true friend,
CONFUCIUS JOE.

---

Plaintiff's Exhibit 10-B.

Good Earth Stock Farm
Statement

Sold to Martin Wick, Highland, Illinois

| Lot No. | Name of animal | Amount |
|---|---|---|
| 11 | Blackbird P. of Good Earth, 1440599... | $1,000.00 |
| 25 | Marydale Barbara 15th, 1421844..... | 1,500.00 |
| 29 | Queen of Good Earth 10th, 1440590.... | 1,000.00 |
| | | $3,500.00 |

---

Plaintiff's Exhibits 10-A and 10-B are the letter and statement I sent Wick upon receipt of his request for his money back (Tr. 77).

I don't remember if I got another letter from Wick.

---

Plaintiff's Exhibit 11.

Highland, Illinois,
September 29, 1952

Mr. Joe Keshner,
c/o Good Earth Stock Farm,
New Florence, Missouri.

Dear Joe:

I did not make the trip out of town over the week end and consequently did not get to Good Earth on Monday as planned. As far as seeing the cattle again, I don't think this is necessary as I saw them on the day of the sale and was quite unhappy about it. If you are interested in having a satisfied customer, and I know you are, then it would be best to follow the plan I have in mind.

I would prefer for you to keep the cattle since I never received the certificates in any event and then I would plan to purchase cattle from you as I need them and have the opportunity of picking out the type of animal that I want. I shall plan to retain the interest in the animal that we purchased together in Oklahoma and the lot #25 Merry dale Barbara Fifteenth, 1421844, that I purchased at your sale. On the other two animals I understood that this was merely by-bidding as I did not have an opportunity to pick these two. I will look forward to receiving your check in the amount of $14,500.00 which will be the amount of refund after deducting the interest in the Oklahoma purchase and lot 25 purchased at your sale.

In view of the fact that there was such a good average of heifers dropped, I feel that you will feel recompensed since you will have had the use of my investment without any interest.

Trusting that you will comply with my request in the interest of keeping good will for the purpose of doing future business, I am

Sincerely yours,
MARTIN M. WICK,
Highland, Ill.

(Tr. 78) I received Plaintiff's Exhibit 11, a letter from Wick dated September 29, 1952.

---

Plaintiff's Exhibit 12.

Joe Keshner,
Good Earth Stock Farm,
New Florence, Missouri,
October 1, 1952

Dear Martin:

I have tried in vain to get you by telephone not only at your place of business but at home, hence this letter.

Your cattle are all ready for you and you may come and get them at your earliest convenience. All papers are in order on them, transfers on your cows as well as on all your calves which are on the ground. As you know these papers have been in our possession only because we favored you by naming your calves and taking care of all those details which required us to have the transfers otherwise we could not have done you the favor of taking care of your calves as they were dropped and named for you. Your books are all in order and may also be picked up when you get the cattle.

Keiki said she sent you the insurance policy to cover your recent purchases of cattle, per your request for her to insure them for you, however, if you do not desire the insurance coverage on the animals to kindly advise her so she can cancel same and then you will be billed only for the time the insurance was in effect instead of on the yearly basis as the policy is now written.

Sincerely,

JOE.

---

(Tr. 79) Plaintiff's Exhibit 12 is the letter, dated October 1, 1952, that I sent Wick in response to Plaintiff's Exhibit 11.

I think that when we sent Wick the registration certificates on October 11 we also sent him pedigree sheets on

the animals. I had these ever since I purchased the animals, almost two years before (Tr. 80). I kept them because I needed them to register the calves; you have to have the dam and the sire.

---

Plaintiff's Exhibits 13-A to 13-L.

[Plaintiff's Exhibits 13-A to 13-L, inclusive, are purported pedigrees of the cows allotted to Wick. Since they are not of detailed materiality to any issue raised by the appellant on this appeal, they are omitted.]

---

Plaintiff's Exhibits 13-A to 13-L are the pedigree sheets.

Q. Now, as I understand your previous answers, you did not send these before that time because you needed them to register the calves before they were born. Do I understand you correctly? A. Exactly.

Q. What items did you have to get off the pedigree sheets in order to send in to register calves that were born?

A. The sire and the dam; then in case of any resale, I could tell any animal that was back in the pedigree.

Q. Well, now, I want, if I can, to show you one——

A. The sire and the dam.

Q. The sire and the dam of whom?

A. Of the calf that was dropped.

Q. But, Mr. Keshner, this pedigree is of the cow. You wouldn't get the sire and the dam of the calf that was dropped off that pedigree, would you?

A. I had the bull. I owned the bull.

Q. Please listen to my question. You wouldn't get the sire and the dam of the calf that was dropped off the pedigree of the mother, would you?

A. The dam.

Q. You would get the dam off of that, and you had a title certificate to the dam giving you her number and everything else, didn't you? A. That's right.

Q. Well, then, what did you need these pedigrees for?

A. Because I wanted them.

---

Plaintiff's Exhibit 14.

[Plaintiff's Exhibit 14 is a postcard sent by Keshner, in Hawaii, to Wick. Since its contents are not of detailed materiality to any issue raised by the appellant on this appeal, it is omitted.]

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(Tr. 82) Plaintiff's Exhibit 14, a postcard sent to Wick from Hawaii and signed "Joe & Kiki," and dated in May of 1952, was sent by me to Wick.

(Tr. 83) The 15 cows allotted to Wick were 15 out of a herd of 36 that I bought from J. P. Ellis of Montgomery City, Mo. I paid Ellis, for all 36, the sum of $11,000 (Tr. 84). I keep records of their ages.

(Tr. 85) Good Earth Farms advertised the terms of one sale held by us as subject to a money-back guarantee to the effect that if a customer was dissatisfied with his purchase he would get his money back. That advertising was circulated generally. Wick bought his cattle from me in February of 1952 and asked for his money back in September of 1952 and in the Aberdeen-Angus Journal for July, 1952, I ran an advertisement.

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Plaintiff's Exhibit 15.

Full-page advertisement, Aberdeen-Angus Journal for July, 1952, page 19:

You Can't Make a Mistake on Any Purchase
You Make At
Good Earth

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Complete Money-Back Guarantee
If Not Satisfied

---

"Me Show" Sale Saturday, September 20th,
1952
New Florence, Missouri

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(Tr. 86) Plaintiff's Exhibit 15, which is page 19 of the Aberdeen-Angus Journal for July, 1952, contains our advertisement stating a money-back guarantee of a return of the purchase price if the buyer is dissatisfied.

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Plaintiff's Exhibit 16.

[The nature and content of Plaintiff's Exhibit 16 are shown in the narrative, and it is not therefore reproduced in extenso here.]

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Plaintiff's Exhibit 16 is a page from the Good Earth Farm catalog for September of 1952 (Tr. 87). It was published by me. It contains a drawing of a Chinese man with a balloon issuing from his mouth with the following legend:

"Confucius Joe say these cattle me
proud to sell,
"Their value only your bid can tell,
"Must satisfy or money-back guarantee,
"Best I can do, believe you me."

The Chinese character represents me.

---

Plaintiff's Exhibit 17 (Stipulated).

(Tr. 88) Plaintiff's Exhibit 17, stipulated by the parties to be a tabulation of the animals comprising the Ellis herd, from which cows were allotted to Wick, is as follows:

| | Name and Year Calved (Born) | Animals Allotted to Wick Designated by "W" |
|---|---|---|
| Cow | Lady Evona 1939 | W |
| Cow | Lady Imogene 1940 | .. |
| Cow | Addie McDonald 1940 | .. |
| Cow | Imogene 1943 | .. |
| Cow | Imogene Adelia 1941 | W |
| Cow | Evona 1942 | .. |
| Cow | Imogene 1942 | W |

| | Name and Year Calved (Born) | Animals Allotted to Wick Designated by "W" |
|---|---|---|
| Cow | Lady Imogene 1942 | W |
| Cow | Evona 1939 | .. |
| Cow | Imogene 1944 | W |
| Cow | Evona Esther 1942 | .. |
| Cow | Imogene Adelia 1942 | W |
| Cow | Addie McDonald 1943 | W |
| Cow | Addie McDonald 1944 | W |
| Cow | Imogene Adelia 1944 | .. |
| Cow | Lady Imogene 1945 | W |
| Cow | Evona Esther 1943 | .. |
| Cow | Evona Mayflower 1943 | .. |
| Cow | Lady Imogene 1945 | .. |
| Cow | Lady Evona 1947 | .. |
| Cow | Lady A. Imogene 1947 | .. |
| Cow | Lady B. Imogene 1947 | .. |
| Cow | Lady C. Imogene 1947 | .. |
| Cow | Evona Esther 1948 | .. |
| Cow | Imogene 1948 | .. |
| Cow | Lady C. Imogene 1949 | .. |
| Cow | Evona A. 1949 | .. |
| Cow | Addie McD. 1950 | .. |
| Cow | Imogene 1951 | W |
| Cow | Imogene Adelia 1950 | .. |
| Cow | Lady C. Imogene 1950 | W |
| Cow | Lady Imogene 1950 | W |
| Cow | Lady Imogene B. 1950 | W |
| Cow | Evona Esther 1950 | W |
| Cow | Imogene B. 1950 | W |
| Cow | Imogene Adelia B. 1950 | .. |

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(Tr. 90) We gave $11,000 for the herd; I don't know if we set up individual values on our books.

(Tr. 91) Exhibits 4-A to 4-Q, the certificates for cows allotted to Wick, were received from Ellis when we purchased the herd and remained in our possession all the time from then until we sent them to the association in July of 1952 (Tr. 92). I can't tell you whether we got Exhibits 13-A to 13-N, the pedigrees, from Ellis, or

whether we made them up. We make up pedigrees. We get the information from catalogs. I didn't make these up myself; maybe my wife did.

---

Plaintiff's Exhibit 18 (Stipulated).

(Tr. 93) Plaintiff's Exhibit 18, a copy of the petition filed by Keshner against Wick in the Magistrate Court of Montgomery County, Missouri, seeking to foreclose an alleged agister's lien, was admitted by stipulation. Summarized, the petition listed the cows allotted to Wick, the calves born to them, and claimed the following amounts:

| | |
|---|---|
| Labor, Feed, Care, Mineral, Salt, Training and Keep, 2/9/52 to 8/9/52, 15 cows @ $10 per month | $2,700.00 |
| Hay for cows, October, 1952-February, 1953 | 187.50 |
| Mixed feed and mineral for calves | 714.00 |
| Hay for calves February, 1953 | 11.25 |
| Hay for calves March, 1953 | 11.25 |
| Mixed feed for calves, March and April, 1953 | 54.00 |
| April 9 to August 9, 1953, feed, care, mineral, salt and keep 6 heifers 4 months @ $10.00 per month and 8 bulls 4 months @ $5.00 per day | 840.00 |
| 1952 Breeding of 15 cows @ $100.00 each | 1,500.00 |
| Miscellaneous: veterinarian service, supplies, care, training and keep, etc. | 213.50 |
| | 6,231.50 |

It prayed judgment and establishment of an agist's lien for the amount and foreclosure of the lien.

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Cross-Examination, by Mr. Lucas.

I was introduced to Wick in Chicago by Mrs. O'Haran, who is the mother of the Mary Lou O'Haran previously refefred to. I had known Mary Lou before. Wick and I talked about cattle then. I didn't see Wick again until January of 1952, when we went to Oklahoma (Tr. 95). I think Mary Lou O'Haran contacted me then. They came

and picked me and we attended a couple of sales in Oklahoma.

In the evening, after we came back from Oklahoma, I discussed with Wick the purchase of cattle from me. That was the first time we discussed it in detail; we had discussed it in a general way before (Tr. 96). I told him I could furnish him bred cows for $1,000 apiece, guaranteed bred. By "guaranteed bred" I meant a cow that would conceive. If a cow does not conceive you have to replace it with a cow of equal value or refund the money.

On February 9, 1952, Wick was with me in the afternoon; I don't know how many hours.

Q. Did you at any time represent to him out of what particular herd, prior to February 9, did you represent to him at any time out of what particular herd of cattle you were going to select the ones that you were going to sell to him?

A. I told him I would pick them out of the Ellis herd that I had purchased. I had purchased a herd; I had some left; I had sold some.

I had sold ten head to Louis Voight at $1,000 apiece; I had sold four head to Rosemary Danforth at $500 apiece, and I had sold one to Elmer Koster at $1,000. I sold the four by 'phone before they were delivered; I sold the ten to Voight about a year before the Wick transaction (Tr. 98). Voight left his cattle with me after the purchase.

On February 9, 1952, the cattle in the Ellis herd were Voight's and Wick's. They were not separated; they were kept in the same pasture. Before I took Wick's check I went down and pointed out to him the cattle I was selling. (Tr. 99) Q. Tell us exactly what you did in connection with that?

A. Well, he had a copy of the numbers that were—that I had chose for him, and I had a copy, which we have here.

I went down into the pasture with Wick.

Q. Did you point out to him the different head of cattle that were in this list of cattle that you furnished him?

A. Corresponded to the chains.

The chain numbers are about three inches high. The tattoo is located in the ear (Tr. 100). On our farm we list by both chain and tattoo number.

Mr. Wick was very satisfied with the cattle. I don't know whether he came back again in February or March. He came back after we came home from Hawaii.

When I left for Hawaii I told my herdsman to see that all of Wick's and Voight's cows were in calf. I did not point out Wick's and Voight's cattle; it was all the same, so far as he was concerned (Tr. 101). We came back from Hawaii the last of May or in June. Wick came to see me after I came home. He was accompanied either by Mary Lou O'Haran or by Pat O'Haran, her sister. They were down in the pasture with me. I pointed out the cattle to him (Tr. 102). At that time they either had calf on the ground or were in calf. The reason I did not register the cattle in Wick until July of 1952 is that they were sold guaranteed in calf, and I had to wait until they conceived.

When Wick saw the cattle in June he expressed himself as very well pleased; his only mistake, he said, was that he didn't buy more. He came a second time before the September sale, and the cows were pointed out to him then. The calves were at the cows' sides, then (Tr. 103).

It is true that Plaintiff's Exhibit 16, my catalog, stated "Terms and Conditions—Complete money back guarantee if not satisfied." But the words "as to breeders" should have been below it. It was announced at the sale by Bill Barton, the sale manager, that way (Tr. 104).

I did not guarantee Wick that I would unconditionally return his money if the cattle were unsatisfactory. I gave only a guarantee that the cows would produce (Tr. 105). All the cattle assigned to him did produce. In September of 1952 some had produced and some were in calf.

These cows were serviced by Prince Eric 5th, GE, a bull.

(Tr. 106) I told Wick that I would take care of his cows and asked him a nominal sum. I guess we agreed around $10.00 a month, and breeding fees of $100, which was very cheap for the bull, and tend to the papers, and keep a record of his calves, which Kiki did. There was no certain time fixed as to how long we were to do this, but he was interested in buying a farm, and I was going to help him run the farm. We would put the cows on his farm if he had a farm, I imagine. He talked like he wanted me to oversee his farm for him and I was very glad to

help him. We had no understanding as to when he was supposed to pay me for the keep of the cows and the servicing of them.

(Tr. 107) I am not keeping cattle for anyone right now. The only ones I kept cattle for were Wick and Voight.

We kept the certificates in August and September so that Kiki could register the calves and have her data on that, so everything was done authentic. When I found out that Wick no longer wished to have the cattle then I sent him the certificates (Tr. 108). This was done in September of 1952. I don't know the exact date. Wick never offered to pay me for the keep of the animals, or for the service of my bull.

(Tr. 109) I did not send in the agister's lien petition. The cattle were finally sold by the sheriff at Montgomery. I was not paid for the feed and servicing; Wick still owes me money.

Redirect Examination, by Mr. Baetz.

(Tr. 110) I did not say that the reason I kept the certificates and did not send them to Wick was because I had to be sure that the cows would conceive, and because if they didn't conceive I would have to substitute another cow. It is correct that I got the certificates from Ellis in January, 1951. It is correct that I sold the cows to Wick in February, 1952 (Tr. 111). The reason I didn't send Wick the certificates as soon as he bought the cows was that I used the certificates to get the dam and sire off of, to register the calves (Tr. 112). It is true I had the pedigrees. I could have gotten the dam numbers off them. We kept the certificates because we kept all his papers. He wanted us to. He never asked. He asked us to keep all his papers (Tr. 114). I never told him what papers there were. The deal we made was that we would register his calves.

Q. He told you to keep all the papers? A. Agreeable.

Q. He told you—please answer my question. He told you then that you should keep all the papers with reference to that transaction? A. Why, yes, yes.

Q. He told you that?

A. Everything that corresponds to his cattle, yes.

Q. He told you that?

A. Everything that corresponded to his cattle, yes.

The period of gestation on a cow is nine months (Tr. 115). Of the cattle allotted to Wick, they dropped calves on the following dates in 1952:

March 8,
March 14,
April 19,
May 6,
May 19,
May 20,
May 26,
June 13,
July 12,
July 12, and
July 22.

These were 11 of the 15 cows allotted to Wick (Tr. 116). Even though the gestation period is nine months, I wouldn't say they were pregnant with calf on February 9, 1952. You would have to have a veterinary. I wouldn't say, as a cattleman, that the cows that had calves between March and July had to be pregnant with them the previous February. I never heard of a calf being dropped three months after conception. I never heard of a cow being dropped five months after conception.

(Tr. 117) I was at the sale to satisfy the agister's lien. I couldn't say how many other cattle buyers were there. I don't know how big a crowd was there. They had a nice crowd; just farmers, that is all. There were no other cattle buyers there that I know of (Tr. 118). I don't know what each individual cow brought at the sale (Tr. 119).

Recross Examination, by Mr. Lucas.

I couldn't say when the remaining cows conceived.

Redirect Examination, by Mr. Baetz.

I do not remember which cows conceived after February 9, 1952.

MARTIN M. WICK,

the plaintiff, called as a witness in his own behalf, testified as follows:

Direct Examination, by Mr. Baetz.

(Tr. 121) My name is Martin M. Wick; I am the plaintiff in this case; I reside at Highland, Ill.; I am a manufacturer of pipe organs for churches; my company is The Wicks Organ Company.

(Tr. 122) I know Joseph Keshner, the defendant; I met him at the International Stock Show in Chicago in the latter part of 1951: I went to the show because I was interested in getting into the cattle business as an investment. I knew the O'Haran people in town were in it, and I talked to them about it, and we decided to attend the show (Tr. 123). Mary Lou O'Haran is a member of that family; she is an employee of the organ company and her family live on a farm near Highland, where cattle are kept.

I had no conversation with Keshner at Chicago about my investing money with him. I next saw him on the way to and from the sales at Tulsa and Miami, Okla., in January of 1952. I and Mary Lou O'Haran drove out to Keshner's Good Earth farm near Montgomery City then (Tr. 124). We left Highland the latter part of the day, and spent the evening at the Keshner farm (Tr. 125). Keshner and I did not have any conversation then about my investing money with him. On the trip to Oklahoma in the car I naturally asked a great many questions of him about what was involved in the cattle business (Tr. 126). He explained to me that to maintain an animal cost in the neighborhood of $200; he said he was averaging about $2,000 a head at his sales (Tr. 127). At Oklahoma it was more or less an interest to go into the cattle business with Miss O'Haran, since I figured she had a knowledge of cattle; but Mr. Keshner indicated he could do much more for me in view of the fact that he was established, and the fact that he could run any cattle through his sale that I would agree to buy, in other words, any offspring could be run through his sale. He explained to me that he knew all these important people in the cattle business, like the Men-

nons and Dr. Hammer, and that it is necessary to know people like that to be able to realize a good profit; that he had all these contacts; and that it would be to much advantage to let him supervise the situation.

(Tr. 128) In the course of the conversation, he asked me about how much I could invest, or spend, and I said that my savings consisted of $15,000, which would be the full amount I could spend at that time. I explained to him that in the pipe organ business (Tr. 129) there were times when I would have to draw on my capital to meet payrolls. He said, "Well, you don't have to worry; your investment is always good and if you need the money, I can always give you your money back."

He explained to me at that time the amount of maintenance; he would set it up on the basis of $200 per head per year, and that would include breeding and also at such time as I would decide to run any cattle through his sale, that he would run them through his sale; that it would be the same type of cattle that he normally has for sale, in other words, young heifers, or young matrons, I think the word is. I didn't know what a young matron was, other than it would be young, of course.

(Tr. 130) Keshner explained to me that I could definitely realize a 25 per cent return on the investment. The maintenance and other charges, he said, would become due a year after I purchased the animals.

(Tr. 131) Our conversation after returning from Oklahoma centered basically around sales, and what cattle brought, and Keshner told me that the cattle I would be purchasing would be the same value as the cattle he was running through the sales, which he said was $2,000. I was told that by him.

I did not give Keshner the $15,000 then, but went on to Highland. I next saw him on February 9, 1952 (Tr. 132). My conversation with him then consisted in confirming what I have already mentioned (Tr. 133). Keshner was specific; he would pick out the cattle to be allotted to me.

Keshner and both the O'Haran girls and I walked out into the pasture, and saw a herd from a distance of about a block (Tr. 134). I didn't care to get too close, because I was afraid of them. I looked at them from about 50 feet. Keshner said the ones with double neck chains would be

mine. I couldn't see all of them; he would say, "Now, there's a double neck chain cow; there's one over there," and that would be about the extent of it (Tr. 135). This was after I had given him my check for $15,000; Keshner had said, "I'll pick out the same sort of cattle that are run through the sale;" and he had also said, "You can rely on what I would pick."

The figures and words "15 bred cows" written on the check for $15,000 I gave Keshner are not in my writing.

I next went out to the Good Earth Farm while Keshner was in Hawaii; this was six or eight weeks after February 9, 1952 (Tr. 136). Clint Holloman, Keshner's man who was taking care of his cattle, was there. I asked him to see my cattle, but he said he didn't know which were mine, and couldn't point them out, so I just left and came on to Highland. I then wrote to Keshner.

(Tr. 137) Keshner got back from Honolulu in June, and I then called at the Good Earth Farm. Keshner was sick in bed. He said to me, "Your cattle are over in a certain pasture with Voight's," but he couldn't come out in the pasture with us, so we just walked around the farm (Tr. 138). I was with a young lady. Holloman did not take us out to the pasture to point out the cattle.

I next visited the Good Earth Farm on September 20, 1952, at the time of Keshner's annual sale (Tr. 139). Prior to the sale, on that day, I was asked by Keshner whether I would be interested in buying some cattle at the sale. He said, "How about letting me pick out five head of cattle for you?" I said, "I couldn't afford five head, but if I see any that look good I'll bid and buy." During the sale I was sitting with people who suggested that this one particular animal looked good to them, so I bid on it (Tr. 140). Shortly thereafter, I heard my name announced as having bid on two additional animals, and since I hadn't bid I began to worry about the money I had paid out to him.

I then asked Keshner to let me see the animals I was supposed to have gotten the previous February. He said they were in a certain pasture. I drove out with some people who were in the cattle business, and we looked at them. They were identified by a double neck chain (Tr. 141). They looked awfully bad, although I could not tell if they were the same animals I had seen on February 9.

Keshner's sale was part of a circuit; from his place we went to Ralph Smith's sale, and then one right out of Kansas City. At the sale I noticed cattle that were young and looked real good being sold for $400 a head, and I really began to worry. I saw what these cattle sold for.

(Tr. 142) I then returned to Highland and wrote Keshner a letter, in evidence here as Plaintiff's Exhibit 9, requesting the return of my money.

(Tr. 143) Keshner told me the cattle he allotted to me would be of the value of $2,000 a head. The reason he gave me why he was willing to make that bargain or deal was that he had all his money tied up in cattle, buildings and property, and it was time for paying income tax, and it would be a help for him to have the cash to make the payment (Tr. 144). Also, that he figured that I was well known in the community of Highland, and that if I were in the cattle business it would bring other young men and other men an interest in getting into the Angus field.

After I wrote Keshner for the return of my money on September 24, I received a bill from Good Earth Farm, which is marked Plaintiff's Exhibit 10-B, for three cows. These were the cows I was supposed to have purchased at the Good Earth Farm sale on September 20. I had only bid on one. I never got any answer or acknowledgment to my letter of September 24 except the bill for the three more cows.

(Tr. 145) I wrote Keshner further, and in January of 1953, I got a letter from Emmett Costello, a lawyer of East St. Louis. Subsequently a conference was had in Mr. Costello's office; Costello had asked me and my attorney, Mr. Baetz, to come. This was in April of 1953. Keshner was unable to be present, and another meeting was held in July of 1953 (Tr. 146). Keshner and his wife were there then (Tr. 147). The purpose of the meeting was to attempt to straighten out the controversy.

(Tr. 148) I never received from Mr. Keshner the original of Plaintiff's Exhibit 2, the purported statement or bill of sale. I never saw it before this day. I received no bill of sale or invoice at any time.

Cross-Examination, by Mr. Spencer.

I never asked for a bill of sale or invoice (Tr. 149). I didn't know what to expect in the cattle business. I knew

that each animal had a pedigree, but as far as what I was supposed to get, I didn't know. I knew that Mary Lou O'Haran had bought some cattle prior to this, but I wouldn't know as to their value, or what was paid for them (Tr. 150). I suppose she had cattle approximately six months prior to my transactions. I don't know how long she had worked for the organ company. The O'Haran farm is about four miles from my place of business. I saw Angus cattle on her place prior to our Chicago trip. I knew she was in the purebred Angus business.

The Chicago trip was the first trip I made to an Angus cattle sale or a place where Angus cattle were sold. I do not recall that I was interested in buying some Angus cattle from a tax standpoint. I could not have said anything like that at that time.

(Tr. 151) I wanted to purchase Angus cattle as an investment. It is correct to say anything is an investment, yes; my organ business is an investment. I wanted to invest in cattle to get a return on my money (Tr. 152). I have some Angus cattle; 11 head of them.

Miss O'Haran, Keshner and I made the trip to Tulsa and Miami, Okla. We talked about purchasing an animal on the trip (Tr. 152). At the sale, Mr. Keshner said, "This is a good animal; how about taking a third interest in it?" I said, "Well, if you say it's a good animal, I'll go along and buy a third interest in the animal" (Tr. 154). Miss O'Haran was to take a third interest, also. I paid $1,000; the animal cost $3,000 (Tr. 155). I wrote the check for the $1,000 the same time I wrote the $15,000 check. The animal we bought there was not the first one through the ring. I had seen the sale at Miami the day before, and I had seen them sell at the Chicago sale.

(Tr. 156) I am 35 years old; I was 33 at the time.

On our way back, they were talking basically about pedigrees. I didn't talk purchase at any time; it was in the nature of an investment; in other words, that I would turn money over to Keshner in the way of an investment for myself. This was said in the hotel at Miami, Okla. I purchased a third interest in an animal after that.

(Tr. 157) We came on back to the Good Earth Farm, and I agreed to invest in 15 cattle, which Keshner was to pick out. I didn't know what I was supposed to get in connection with pedigrees; all I knew was that I was

giving him $15,000, and he in turn would pick out cattle either out of his lot or out of other herds that were to be sold, to be turned over to me for the $15,000.

I think there were 30 or 35 cattle in the pasture; there could have been more. This is my recollection (Tr. 158). There might have been 28 or 29. I think there were considerably more than 25; I would not be positive.

You could see the chains on the cows, but not the numbers. Keshner said, "The cattle with the two chains are the cattle for you," that is correct (Tr. 159). We just walked down to the edge of the field, and he said, "Now, there are your cattle, and they're in with another herd." The other herd was the Voight herd. He didn't go down in the pasture and look at them. I could have gone down and looked at them, but I didn't care to be getting out there with the cattle.

Keshner was picking out the animals; not I. Miss O'Haran was along at the time (Tr. 160). Mrs. Keshner said she would handle the insurance, but I don't recall the details of any conversation. I don't remember discussing a herd policy; I don't remember any details of the conversation (Tr. 161). It could have taken place. We were merely talking about animals which Keshner was going to pick out for me.

(Tr. 162) I knew the Keshners were going to Hawaii; they told me. When I asked Clint to see the cattle in April, I was by myself (Tr. 163). I asked Clint to find me the cattle that Keshner had picked out. Clint said he didn't know; that there was a herd down there and that my cattle had double neck chains, but some of Voight's cows were in with them, and they had double neck chains, too. Clint said he didn't know anything about it, that I should write Keshner and find out the details, and then come back and see him. So I didn't go down to look at any cattle.

(Tr. 164) I had been in Kansas City, and was on my way home at the time. Later I flew an airplane in; we walked around the farm (Tr. 165). We did not go into any pasture where the cows could get at us. We were at the farm several hours, I suppose. Mrs. Keshner met me when I landed the plane. She drove me past a farm, and I mentioned to Mr. Keshner that I hoped the cattle in time would earn sufficient money for me to be able to afford to

buy a farm. I recall looking at only one farm (Tr. 166). It was a farm adjoining Keshner's.

Keshner was sick at the time, and I didn't ask him to go down and point out my cattle to me. I had no reason then to be concerned about the value of the cattle because I was relying on him.

Both the O'Haran girls and I drove down one Sunday during the summer months. It was a very hot day. I'm not familiar with drouths in that area (Tr. 167). I don't remember if it was dry in 1952 (Tr. 168). I never did go down in the pasture and look at my cattle; I am sure. I just walked around the farm (Tr. 169). At one time Keshner was trying to arrange to see a farm of Hensley's, or something like that; but I told him it was impossible for me to spend any money like that (Tr. 170). I don't believe anyone other than the Misses O'Haran and the young lady from Kansas City ever accompanied me to the Keshner farm (Tr. 171). On the trip back from Kansas City, I am certain I did not look at my particular cattle. They were in a herd with other cattle; Voight's, I suppose. I don't remember seeing cattle with a Mr. Waples (Tr. 172). I don't even know a Mr. Waples.

I'm sure what I'm telling here is the truth.

There was a pretty good crowd at the September sale at Good Earth Farm (Tr. 173). I wanted Keshner to pick out the cattle; show them to me one at a time. I had a good reason to be exercised about my cattle after the sale (Tr. 174). The reason was that my name had been used to purchase two cows when I never bid on them.

I saw the cattle that day. I was able to find them after Keshner told me where they were (Tr. 175). I was afraid of the cows that day, but I went into the pasture with cattle people. I was in an automobile (Tr. 176). I drove my car through the field, and stayed in it.

The first thing I was worried about was when Keshner used my name for a buy bid (Tr. 177). Then we went to Kansas City and saw beautiful animals, pretty and young, being sold for $400, and I began to worry all the more.

When I saw the cattle in the pasture there were calves running all over the place. I suppose that if the cows had been nursing the calves all summer they wouldn't

be fat. I don't know if the keep I was to pay was supposed to keep them in sale condition. I didn't know what their ages were (Tr. 178). I attended a sale at Columbia and bought three cows and a calf. I purchased an animal at the Ralph Smith sale for $1500 (Tr. 179). Miss O'Haran and other cattle people were with me on the trip. She advised and recommended the sale. I didn't buy any at Kansas City; I didn't have any money left.

I didn't pay for the cow I bought at Keshner's sale (Tr. 180). He could have deducted that price from the others when I asked for my money back. I was to pay for the keep of the cattle at Keshner's farm for a year; I never offered to pay him because the year wasn't up. The only statements rendered me by Keshner were after this litigation was started.

The meeting at Mr. Costello's office was to try to settle the whole matter. Keshner had told me to move the cattle in a previous letter (Tr. 181). That was contrary to the original understanding.

The cows were to be bred to Keshner's best bull, which I understood was a grand champion. I never tendered back any registration certificates. I learned today that each animal had to be transferred by the certificate (Tr. 182). I didn't know it before. I knew nothing about pedigrees; I don't know it to this day. I don't know what is supposed to be on the paper (Tr. 183). I got a paper like that (a certificate) from Columbia; I haven't registered a calf from it. Miss O'Haran would do that; she keeps the cattle. I have the transfers. I expected Keshner to take care of the papers as far as writing out the pedigrees; it would have to be done by someone in the cattle business (Tr. 184). I sign the applications on the calves I have at Miss O'Haran's place; I know they have to be signed, like any certificate of title (Tr. 185). I didn't know that Good Earth couldn't do anything with these cattle after the papers had come to me; the association still had the records.

Actually, the cattle were sold by Keshner without the certificates. This was by court order. I received a copy of the petition that was filed, and a letter from the judge (Tr. 186). I received a notice that the cows were going to be sold (Tr. 187. I think there was a telephone call

from Keshner about the sale of calves, covering much of what was in his letters.

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Defendant's Exhibits A, B and C.

Defendant's Exhibit A is a carbon copy of a letter written by Keshner to Wick, as follows:

December 13, 1952

Mr. Martin Wick
Wicks Organ Company
Highland, Illinois

Dear Martin:

Had a calf buyer at the farm Friday. He will take all of your calves. Please quote prices on the heifers and bulls, you have fourteen head. Many thanks for replying by return mail so I can let him know as he wants to know right away.

Sincerely

JOE KESHNER.

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Defendant's Exhibit B is a copy of the published legal notice of the sale under the suit foreclosing the agister's lien. Since it is not relevant to the issues on this appeal, it is not set forth.

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Defendant's Exhibit C is a carbon copy of a letter written by Wick to Keshner, as follows:

Highland, Ill.,
December 19, 1952

Mr. Joe Keshner,
c/o Good Earth Stock Farm,
New Florence, Missouri.

Dear Mr. Keshner:

This is to acknowledge your letter of December 13, 1952, regarding the calf buyer that you had on your farm last Friday. This is to advise you that I do not in any way wish to affirm the sale of the original heads of cattle, as in view of what has transpired I am interested in only one thing, and that is for the complete money refund of my investment.

In the event that it is possible by the sale of these calves for you to give me the full money refund, of course, then I am definitely interested.

Sincerely yours,

MARTIN M. WICK.

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I received the letter from Keshner which has been marked as Defendant's Exhibit A (Tr. 189). I do not remember seeing Defendant's Exhibit B (Tr. 190). I remember sending Defendant's Exhibit C. My attorney had the registration certificates. I did not know that I had to sign them.

(Tr. 191) There was never any request for the return of those certificates by Keshner. I do not know of any requests for them; Keshner would be the natural person to ask for them.

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Defendant's Exhibit D.

Defendant's Exhibit D is a letter addressed from Wick to Costello, one of the attorneys for Keshner:

Highland, Ill.,
January 26th, 1953

Mr. E. Costello Sr.,
Rooms 606-618 First National Bank Bldg.,
East St. Louis, Illinois

Dear Mr. Costello:

This is to acknowledge your letter of January 22nd 1953 and in answer thereto wish to advise you that you may expect to hear direct from my Attorney Mr. Emerson Baetz, whose address is First National Bank Bldg., Alton, Illinois. Mr. Baetz is laid up with the flu complicated with pneumonia and it will undoubtedly be from ten to fourteen days before he will be able to contact you. In the meantime this is to advise you that I regard the sale as void due to the misrepresentation of Mr. Joseph Keshner.

Very truly yours,

MARTIN M. WICK,
Highland, Illinois

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I sent the letter which is marked Defendant's Exhibit D to Mr. Costello.

On February 9 we saw the cattle in the pasture; that is correct (Tr. 193): At no time were any cattle ever picked out as you would normally do, and Keshner did not say, "Now, this is your cow," or "This is your heifer," or "This is the pedigree of the cattle."

On the day we drove through the pasture in an automobile Cotton Fairchild, who is connected with a farm in Louisiana, was with the Misses O'Haran and me. I did not say anything to him about prices or what the cattle were worth. He doesn't know what I bought my animals for (Tr. 194). I said to him, "These are animals that Joe Keshner has picked out that are supposed to have double neck chains." In February, we saw them from a distance (Tr. 195). I was told later that the animals I saw with double neck chains would be mine. I couldn't tell just by looking at the animal if it was the same animal I had seen in February.

It wouldn't be possible to count them. You would have to go into the herd and steer them around, to separate those with double neck chains. I can't walk through a herd in the pasture and do that. I could drive an automobile in the pasture; I did that (Tr. 196). But I did not count each one, because they kept shifting around by the time I would look at one, and because there were other cattle in there.

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CLARENCE LANDRUM,

called as a witness in behalf of the plaintiff, testified as follows (Tr. 197):

Direct Examination, by Mr. Baetz.

My name is Clarence Landrum; I live at Montgomery City, Mo.; I am sheriff of Montgomery County, Mo., and was sheriff in the fall of 1952.

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Plaintiff's Exhibit 19.

[Plaintiff's Exhibit 19 is a special execution issued out of the Magistrate's Court of Montgomery County, Mo., to

sell certain cattle under foreclosure of an agister's lien in the case of Keshner v. Wick. Since its content is not material, it is not here set forth.]

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I received Plaintiff's Exhibit 19, which is a special execution from the Montgomery County Magistrate's Court, to sell certain cattle in the case of Keshner v. Wick.

(Tr. 198) I made the sale, assisted by Mr. Spencer, who was Keshner's attorney. In response to a subpoena, I have brought the records of the sale. The sale was held November 3, 1953.

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Plaintiff's Exhibit 20.

Execution Sale

| Association Number | Chain No. | Calved | Execution Sale Price | With Calf? | Sheriff Receipt Number |
|---|---|---|---|---|---|
| 563197 | 122 | 1939 | $100.00 | No | 20 |
| 675848 | 123 | 1941 | 180.00 | Yes | 13 |
| 675854 | 125 | 1942 | 185.00 | No | 21 |
| 675856 | 124 | 1942 | 165.00 | No | 22 |
| 720291 | 128 | 1944 | 205.00 | Yes | 11 |
| 720295 | 130 | 1942 | 300.00 | Yes | 14 |
| 736254 | 121 | 1943 | 190.00 | Yes | 10 |
| 776635 | 129 | 1944 | 220.00 | Yes | 15 |
| 776637 | 127 | 1945 | 230.00 | Yes | 12 |
| 1336289 | 117 | 1950 | 380.00 | Yes | 19 |
| 1336291 | 113 | 1950 | 270.00 | Yes | 9 |
| 1336292 | 118 | 1950 | 370.00 | Yes | 18 |
| 1336293 | 116 | 1950 | 310.00 | No | 8 |
| 1336294 | 119 | 1950 | 345.00 | Yes | 16 |
| 1341307 | 120 | 1950 | 335.00 | Yes | 17 |
| | | (Following are calves separately sold) | | | |
| 1561596 | 33 | 3/ 8/52 | 225.00 | | 1 |
| 1561597 | 14 | 3/14/52 | 240.00 | | 24 |
| 1561598 | 54 | 4/19/52 | 270.00 | | 26 |
| 1561599 | 21 | 5/ 6/52 | 175.00 | | 28 |
| 1561600 | 58 | 5/19/52 | 250.00 | | 2 |
| 1561601 | 22 | 5/20/52 | 210.00 | | 25 |
| 1561602 | | 5/26/52 | NSOER | | |
| 1561603 | 143 | 6/13/52 | 230.00 | | 7 |
| 1561604 | 7 | 7/12/52 | 185.00 | | 4 |
| 1561605 | 9 | 7/12/52 | 200.00 | | 27 |
| 1561606 | 134 | 7/22/52 | 250.00 | | 3 |
| NCDTW | 140 | 12/ 5/52 | 225.00 | | 6 |
| NCTDW | 141 | 12/15/52 | 175.00 | | 5 |
| NCDTW | 49 | 6/15/52 | 230.00 | | 23 |

NCDTW—No certificate delivered to Wick.
NSOER—Not shown on execution return.
Total, $6,650.00

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(Tr. 199) Plaintiff's Exhibit 20 is a tabulation from my receipt books. It shows what each animal brought individually (Tr. 200). When the tabulation says "with calf" it means that a cow with a calf at side was sold as one parcel; there were also a number of calves sold independently, and each one of them is a parcel (Tr. 201). There were 28 parcels sold, and 11 of the parcels each consisted of a cow and calf at side, so there would be a total of 39 animals sold.

Cross-Examination, by Mr. Lucas.

About 100 people attended the sale; most of them were farmers, around the neighborhood. I lived in Montgomery County (Tr. 203). It was dry all three years, 1952, 1953 and 1954.

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ORVILLE HELMS,

called as a witness in behalf of the plaintiff, testified as follows (Tr. 204):

Direct Examination, by Mr. Baetz.

My name is Orville Helms; I live at Belleville Ill.; my business is the breeding of Angus cattle, and farming; I am Secretary and Sales Manager for the Southwestern Illinois Angus Breeders' Association. I have been in the Angus business all my life (Tr. 205). I am familiar with and I follow the sale prices of Angus cattle in Illinois, Missouri, Oklahoma and the surrounding territory (Tr. 206). As a part of my business and my office in the Association, I follow the sales prices all over the country. I have witnessed sales in this territory myself, and have participated in them.

The value of an Angus cow is based on the pedigree and the individual (Tr. 207). The age of the animal also has an influence upon its price or value. By "value" in my answer to questions is meant what an animal would be worth in the event of sale to a willing purchaser by a willing seller.

Mr. Lucas: My objection doesn't go to the form of any question; it goes to the fact that in a case of this kind, under the charges of the petition, that the question of value is a question of opinion on the part of different persons and can have no bearing upon the question of fraud or misrepresentation, inasmuch as it is a matter of opinion of the parties. In Missouri, under Missouri law, that is not proper inquiry.

The Court: Overruled.

Mr. Lucas: May it be stipulated that my objection will go to all questions along this line?

The Court: It may be so understood.

Mr. Baetz: Yes, sir, it may be so stipulated so far as I am concerned.

Tabulation of Testimony of Witness Helms as to Values:

(Note: The witness Helms, under questioning by plaintiff's counsel, here proceeded to give his opinion as to the values of the animals allotted to Wick. To shorten the narrative, his testimony is now reduced to tabular form.)

| Plaintiff's Exhibit No. | Breeders' Association Certificate No. | Pedigree Exhibit No. | Name | Value in February of 1952 |
|---|---|---|---|---|
| 4-A | 563197 | 13-A | Lady Evona | $400.00 |
| 4-B | 675848 | 13-B | | 300.00 |
| 4-C | See explanatory remark by counsel below | | | |
| 4-D | See explanatory remark by counsel below | | | |
| 4-E | 720291 | | | 400.00 |
| 4-F | 720295 | | Imogene Adelia | 400.00 |
| 4-G | 732654 | 13-D | Addie McDonald 43 | 400.00 |
| 4-H | 776635 | 13-E | | 500.00 |
| 4-I | 776637 | 13-F | Lady Imogene 45 | 500.00 |
| 4-J | 1336289 | 13-G | Imogene Adelia 50 | 600.00 |
| 4-K | 1336291 | 13-H | Lady Imogene 50 C | 600.00 |
| 4-L | 1336292 | 13-I | Lady Imogene 50 | 600.00 |
| 4-M | 1336293 | 13-J | Lady Imogene 50 B | 600.00 |
| 4-N | 1336294 | 13-K | Evona Esther 50 | 700.00 |
| 4-O | 1341307 | 13-L | Imogene B 50 | 600.00 |

Mr. Baetz: Now just for the sake of the record, I know that is only 13 and there are 15, but we lack the whole 15. I just want to point that out (Tr. 212).

Cross-Examination, by Mr. Spencer.

I saw the tabulated pedigrees a few days ago. I may or may not have seen the individual animals. They have never been identified to me. I made the determination of values from three factors: pedigree, individual and age (Tr. 213). I understood they were good quality cattle before answering (Tr. 214). Pedigree has something to do with value. A registered animal hasn't any value unless it has a good pedigree. The individual animal also has something to do with value (Tr. 215). By that I mean its quality. On the animal represented by Pedigree Exhibit 13-A I put a value of $400. On 13-B I put a value of $300. I put the $400 value on Imogene Adelia 44 (Tr. 216). 13-M is $400. 13-B would be $400. The animal marked 4-B on the registration certificate I valued at $300 (Tr. 217). I made an error in the name, 13-B is valued at $400 (Tr. 218). Age is a factor in valuation. An animal is most valuable from about two years of age to eight years of age; the older they get the less value they have.

The cow represented by Exhibit 13-A was calved in 1939; she was 13 years old in 1952. 13-M was 11 years old in 1952; she was calved in 1941 (Tr. 219). Pedigree is also a factor, and there are also other factors (Tr. 220). I do not know what bull these cows were bred to, but I heard testimony which mentioned a bull named Prince Eric of Good Earth 5th. I considered that information, but I placed my values on the individual, pedigrees and tabulation (Tr. 221). I included pedigrees (Tr. 222). I assumed they were in calf, at their age, or had a calf at their sides.

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CURTIS EASTWOOD,

called as a witness in behalf of the plaintiff, testified as follows (Tr. 223):

Direct Examination, by Mr. Baetz.

My name is Curtis Eastwood; I live near Fulton, Mo.; my business is raising Angus cattle; I have been engaged in that business for about 30 years, and our entire income for several years has been from cattle alone. I follow, as a matter of my business, the sales prices of Angus cattle

in Missouri and elsewhere (Tr. 224). I attend all the sales in Missouri that I can.

I saw the herd of cattle that were owned by J. P. Ellis and were sold by him to Joseph Keshner in January, 1951, on the Ellis property. I saw the females, not the herd bull. I went there with people who were wanting to buy some cattle (Tr. 225). The cattle were in the field, and we walked among them.

Q. Now, Mr. Eastwood, in appraising or setting the value of cattle, and by "value" I mean the amount which would be paid by a willing buyer to a willing seller, what factors would you take into consideration?

Mr. Lucas: Just a moment; I object to this inquiry for the same reason that I objected to the inquiry as to the value by the previous witness, claiming that it is wholly immaterial and irrelevant in this case and cannot be a determining factor on the charge of fraud; furthermore, that this witness has not been qualified so far, doesn't show how many purchases or sales he himself undertook, or that he really is an expert in the line. There's nothing to base his opinion on.

The Court: Overruled. It's a matter before the court. We will hear it for what it may be worth.

Mr. Lucas: May I again ask that my objection run to similar inquiry on the part of this witness?

The Court: It may be so understood.

(Tr. 226) I consider the individual and the tabulation 50-50. By tabulation I mean pedigree.

Tabulation of Testimony of Witness Eastwood as to Values.

(Note: The witness Eastwood, under questioning by plaintiff's counsel, here proceeded to give his opinion as to the values of the animals allotted to Wick. To shorten the narrative, his testimony is now reduced to tabular form.)

| Plaintiff's Exhibit No. | Breeders' Association Certificate No. | Pedigree Exhibit No. | Name | Value in February of 1952 |
|---|---|---|---|---|
| 4-A | 563197 | 13-A | Lady Evona 39 | $500.00 |
| 4-B | 675848 | 13-M | Imogene Adelia 41 | 400.00 |
| 4-C | 675854 | 13-B | Imogene 42 | 400.00 |
| 4-D | 675856 | None | Lady Imogene 4 | No pedigree |
| 4-E | 720291 | 13-M | Imogene 44 | 400.00 |
| 4-F | 720295 | 13-C | Imogene Adelia 42 | 400.00 |
| 4-G | 732654 | 13-D | Addie McDonald 43 | 400.00 |
| 4-H | 776635 | 13-E | Addie McDonald 44 | 400.00 |
| 4-I | 776637 | 13-F | Lady Imogene 45 | 400.00 |
| 4-J | 1336289 | 13-G | Imogene Adelia 50 | 500.00 |
| 4-K | 1336291 | 13-H | Lady Imogene C 50 | 500.00 |
| 4-L | 1336292 | 13-I | Lady Imogene 50 | 500.00 |
| 4-M | 1336293 | 13-J | Lady Imogene B 50 | 500.00 |
| 4-N | 1336294 | 13-K | Evona Esther 50 | 700.00 |
| 4-O | 1341307 | 13-L | Imogene B 50 | 500.00 |

Cross-Examination, by Mr. Spencer.

I sold you the first purebred Angus cow you owned, for $200 (Tr. 231). It was with a heifer calf at side. I don't recall if you sold her in 1950. She was from Enchantress Trojan Erica. You bought her in 1939 as a 2-year-old; you sold her in 1950 for $550 (Tr. 232). I think 1951 was the best sale we have ever had. In 1952 they were down a little, but not much. In 1953 they dropped way down. In 1951 we sold a Blackcap Empress for $2600 (Tr. 233). I got $200 for two Blackcap Empress heifers in 1954, when it was dry. Blackcap Empress have been a popular cattle. Blackcap Revolution probably started the ball rolling. Blackcap Empress was an International Grand Champion (Tr. 234). Black Jestress are fourth branch Blackbird; Ralph Smith or someone had one that was a Grand Champion, that's right. They are very desirable to own (Tr. 236). Lady Banmere was International Grand Champion the last few years. I didn't hear Frank Richards' testimony (Tr. 237). Assuming that Frank Richards did say that the Grand Champion in 1952 was from the same family as these Lady Jeans, I haven't heard of anyone hunting them. The heifers Elbert Jones bought for $200 weren't the heifer the $2600 heifer was.

We saw the Ellis cows in 1951; we didn't have a tabulation. I think that selling prices have something to do with values, yes (Tr. 238). I don't know Mr. Voight; I don't know how well he's versed in Angus breeding, or how good a judge he is. I wouldn't give any weight to

what a new man paid for cattle; registered breeding is a new world.

(Tr. 239) I don't know Mr. Koster. What he paid for a cow in 1951 at private sale wouldn't affect me on this tribe of cattle, no.

I put a lot of emphasis on the family name. The condition of pregnancy has something to do with the value of a cow.

Q. You mean if they were close to pregnancy, they would be worth $100 more?

A. At that time, I think they would have been, over an open cow, in 1952.

Mr. Baetz: You mean "close to pregnancy"?

Mr. Spencer: Close to calving. Curtis and I know what we're talking about.

If the animals are calves in 1950, they could calf in 1952 (Tr. 242). It makes a difference what bull a cow is bred to, regardless of the female. It is possible, in some cases, that the same cow, with the same pedigree, would sell higher or lower, depending on who is selling her, yes. I have heard of cases where a cow might sell in less than a year's time for two or three times the original selling price. The reason is that the owner probably bred the cow to a $50,000 or $60,000 bull. (Tr. 243). Some herds are advertised more than others, and this makes a difference. But advertising doesn't make the cattle any better.

A cow with good cattle back of her, in the family, would have larger percentage in reproducing the high type cattle than would a cow without good backing, even bred to a good bull.

(Tr. 244) I attended the Triple-A sale in June of 1943. I saw cow No. 43 a few days before the sale (Tr. 245). She was sold to Mel Davis for $3,000, carrying service to a $36,000 bull. She was a Lady Jean (Tr. 246). You have to consider the cow and the bull. I still stick to 50-50 when I go to buy a female; 50 percent on the individual, 50 percent on the pedigree.

R. EMMETT COSTELLO,

called as a witness in behalf of the plaintiff, testified as follows (Tr. 247):

Direct Examination, by Mr. Baetz.

My name is R. Emmett Costello; I am an attorney at law, practicing at East St. Louis, and I was in 1952 and 1953 (Tr. 248). On December 24, 1952, I wrote Mr. Wick about a demand by Mr. Keshner against him for a feed bill.

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Plaintiff's Exhibit 21.

[The nature of Plaintiff's Exhibit 21 is indicated in the narrative. Since it is not deemed material to the issues on appeal, it is not reproduced in extenso here.]

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The letter I wrote him is now marked Plaintiff's Exhibit 21. I got no answer, and in January 22, 1953, I wrote him again (Tr. 249). Then I got a letter telling me to contact Mr. Emerson Baetz, his attorney. I then wrote Baetz and asked him to get in touch with me. Baetz then called me on the telephone (Tr. 250). We finally set up a meeting in April of 1953, at which Wick and Keshner were supposed to be present. On that date Wick and Baetz came, but Keshner was in Florida. Wick and Baetz and I discussed the matter. I was anxious for Wick to take over the cattle (Tr. 251). After we got through with the meeting, I had the information that there was a controversy.

Then I wrote Baetz again that I wanted another conference, and we finally had another meeting the last of June or early part of July (Tr. 252). Both Keshner and Wick were there and stated their respective positions, and Baetz and I came to the conclusion that we were not going to be able to settle it. I then gave the file back to Mr. Keshner and told him he should consult a Missouri lawyer.

[No cross-examination.]

MARY O'HARAN,

called as a witness in behalf of the plaintiff, testified as follows (Tr. 253):

Direct Examination, by Mr. Baetz.

My name is Mary O'Haran; I live at Highland, Ill.; I am employed at the Wicks Organ Co., operated by the plaintiff; I live on a farm outside of Highland, and raise Angus cattle there (Tr. 254). I am 25 years old. I bought my first two cows in August of 1950.

I went along with Keshner and Wick on a trip to cattle sales in Miami and Tulsa, Okla., in January of 1952. Mr. Keshner called me long distance and asked me to go (Tr. 255). He also asked me if Mr. Wick was still thinking about cattle, and if I thought he would like to go along.

I asked Mr. Wick, and the result was that Wick and I went in his automobile. We stopped first at the Keshner farm, and stayed there overnight. There were just the three of us, Wick, Keshner and I, on the trip.

(Tr. 256) There was conversation about cattle on the trip. Keshner told Wick, in substance, the glories of the cattle business. He told him the profit that was to be made from it, the sales, the averages that were going on. the fact that Angus cattle were the best beef cattle in the world, and things of that sort (Tr. 259). At one point Mr. Keshner said that the return would be about 25 percent on the investment; that it was just like clipping coupons (Tr. 260). He said the cow drops a coupon once a year, and you can't lose if the Good Lord don't call them home.

I next accompanied Mr. Wick to the Good Earth Farm on February 9 (Tr. 261). I wasn't present when Mr. Wick paid money to Mr. Keshner; I was in the kitchen. Mr. Wick, Mr. Keshner, my sister Pat and I walked into a field and looked at some cattle. About 25 or 30 were in the herd (Tr. 262). Mr. Keshner said that among these were the cattle that he was going to allot to Mr. Wick.

(Tr. 263) There was a bull in the field with the cows, but I didn't recognize him. Mr. Keshner said he was Prince Eric 30 something. I have seen Prince Eric the 5th at Mr. Keshner's sale, and it was not Prince Eric the 5th in the pasture.

The next trip I made to Good Earth Farm with Mr.

Wick was in the summer of 1952. Mr. Keshner was there, and he took us down to a pasture and showed us his cows (Tr. 264). We just walked in the pasture; there were about 25 or 30 cows in there. Mr. Keshner said some of Mr. Wick's had double neck chains, but we couldn't tell his double neck chained cattle from the other double neck chained cattle.

(Tr. 265) I next visited Good Earth at the 1952 sale in September. Mr. Wick and I drove through the pasture then in a car. We still had no idea of his cattle except for the double neck chains.

Mr. Wick had no experience in the cattle business before he went to the International Show in December of 1951. I had asked for time off to go to a Texas sale, and we got to talking, and he said he would like to invest in cattle; and after we came back we talked about it.

Cross-Examination, by Mr. Spencer.

(Tr. 267) I bought my first cattle in 1950; they were an Erica and a Blackcap. This was the same Erica family as involved in this case. She was three years old; I paid $1000 for her. I also paid $1000 for the other cow, a Blackcap (Tr. 268). I now have six females, a bull and calves. I never got a bill of sale from Keshner, but I got pedigrees from him the day I paid for the cows. The cows allotted to Mr. Wick belong to two families, Pride of Aberdeen and Erica.

(Tr. 269) We did not look at the cattle that Wick later got when we came back from Oklahoma; we looked at sale cattle. I came back in February with Mr. Wick (Tr. 270). I was in the house when the transaction took place, but not in the room.

The registration on calves shows the sire, yes (Tr. 270). On Exhibits 5-A to 5-K the sire appears to be Prince Eric GE 5th (Tr. 271). That is what the transfer said. If Prince Eric GE 5th bred the cows, he would have to be with them. Mr. Keshner said the bull with the cows was Prince Eric 30th something.

(Tr. 272) The sale I attended in Texas was in the spring of 1951. Mr. Wick then talked to me about buying cattle. About a month after I got back we talked some more. He was not talking about buying, but investing; investing in

my little operation (Tr. 273). He doesn't have any money invested there now. He has some cattle on my farm.

Some time in the winter of 1951-52 my parents and I went to Keshner's farm. Mr. Wick wasn't along. It was before February, 1952 (Tr. 273). The next time I went down was in the summer of 1952, with my sister Pat and Mr. Wick. I don't remember what month it was. Keshner and Pat and I went out to look at the cattle, and I think there was another visitor. I'm not sure that Wick was along (Tr. 275). I have attended a lot of sales. I have never heard a supposed buyer deny that he made a bid.

Tr. 276) On February 9, 1952, I went with Mr. Wick to the pasture where 25 or 30 cattle were. Some of them had double neck chains. Mr. Keshner then said the double neck chained cattle were the ones Wick was interested in (Tr. 277). I think we looked at the cattle in the summer of 1952, although I am not sure. I got badly sunburned on that trip.

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PATRICIA O'HARAN,

called as a witness in behalf of the plaintiff, testified as follows (Tr. 278):

Direct Examination, by Mr. Baetz.

My name is Patricia O'Haran; I am the sister of the young lady who just left the stand; I live on the farm at Highland; I am 22 years old (Tr. 279). I helped Mary at first with her cattle, but I dropped out. I have been to several sales and the International. I went to Good Earth Farm with Mr. Wick and my sister on February 9, 1952. I wasn't present when any money was paid; I was in the kitchen, playing with the children (Tr. 280). Mr. Wick, Mary and I went to look at some cattle in a pasture. The cattle were all around, not very close; there were two fields with a fence between; the cattle were in one field and we were in the other. It seemed to me like a big herd, 30 or something (Tr. 281). I heard Mr. Keshner say something about double neck chains, and that some of the ones with double neck chains were Mr. Voight's. I didn't have any reason to count the animals.

We also went to the farm in the summer of 1952, and while there we looked at cattle (Tr. 282). Mr. Keshner

was along, but I didn't hear any statements by Mr. Keshner that I remember. About the same number of cattle were there, but some had calves.

I was last at Good Earth Farm at the time of the sale. Mary and Mr. Wick were there. We didn't go there together; we met there. Mother was with me. This was in 1953 (Tr. 283). I was also there at the 1952 sale. I can remember Martin then asked Joe where the cattle were, and Mr. Fairchild and Betsy Voight and Mary and Martin and I drove out into the field. We saw some cows, approximately 30. We just looked at them.

Cross-Examination, by Mr. Lucas.

I guess the cows looked thinner then than in February, but they were just cattle. It was dry, but I don't know what degree the drouth was. They had double neck chains (Tr. 285). I don't have any idea how many had double neck chains; I didn't notice if there were any single neck chains. We flew down on February 9 (Tr. 286). I just overheard the conversation on February 9; I wasn't particularly interested. Mr. Keshner said that there were some cattle in there that he was interested in and I took it for granted that he was interested in selling them to Mr. Wick, because he pointed them out and said, "Mr. Wick, those are the cattle" (Tr. 287). Mr. Keshner said Mr. Voight's cattle had double neck chains, too.

There were double neck chains and single neck chains, and some of the double neck chain cattle were supposed to be bought by Mr. Wick (Tr. 288). I had no occasion to count them. I thought there were 25 or 30 cows in the herd; that's a large herd to me.

At that time I was 19 years old; I had been in the cattle business with my sister about six months (Tr. 289). I was just helping out; I didn't pretend to know a great deal about cattle.

In the summer of 1952 I think the herd looked larger. My sister got a sunburn on that trip. I don't remember whether she actually went out in the field (Tr. 290). Mr. Keshner and Mr. Wick went in the field. Mr. Maples or Waples, I don't know what it is, talked to me close to the barn, but I don't remember whether he went out there. I

wouldn't remember any particular conversation. I think Mr. Keshner said something about like "This cow had a calf" or "a heifer," and "this is going to have a calf soon." He didn't particularly point any cow out as Wick's, and I didn't know from the conversation if he was pointing out Wick's cow (Tr. 291). We didn't get close to the cows; we were at least as far away from them as the chairs in the courtroom (Tr. 292). I don't know how far that would be in feet. We didn't stay long in the field; we just walked around and came back. We looked at the calves; I don't think any cows were pointed out. I don't know if they had double neck chains (Tr. 293). The third time I saw the cattle was in September, 1952, when we drove in the field in an automobile. We didn't get any closer to the cattle; they moved away as the car came through. That is the only inspection that was made; we just drove out in the pasture and came back.

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GEORGE SPENCER,

called as a witness in behalf of the plaintiff, testified as follows (Tr. 294):

Direct Examination, by Mr. Baetz.

[The witness was not asked his name, but he was George Spencer, one of counsel for the defendant, who had been participating in the trial.] I succeeded to the management of this case in the summer of 1953, about July 15 (Tr. 295). I then wrote to Mr. Wick and he said he had an attorney, and about in August I got in touch with Emerson Baetz. We corresponded for a time, and I called Baetz to make an appointment to call at his office. He suggested, as more convenient for me, that I meet him at the St. Louis Law Library. I had written him that it was desirable that the case be settled, if possible (Tr. 297). We then met at the Law Library. Baetz had previously sent me a draft of a complaint which he stated he was ready to file.

When we met at the library there was conversation to the effect that Baetz should delay filing for three weeks to see if any formula could be worked out for a settlement (Tr. 298). Baetz said he didn't want to be held guilty of

laches, and I said that the additional time would not be construed as additional time for that purpose.

[No cross-examination.]

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Plaintiff's Exhibits 1 to 21 Admitted in Evidence.

Mr. Baetz: Plaintiff will now offer in evidence Plaintiff's Exhibits 1 to 21, inclusive.

Mr. Lucas: No objection.

The Court: Without objection they will be admitted.

(Tr. 299) Mr. Baetz: Plaintiff will rest.

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Defendant's Motion for Dismissal Filed and Presented; Ruling Reserved.

The defendant here offered his motion for dismissal, in words as follows (caption and signatures omitted):

> "Comes now defendant at the close of the presentation of plaintiff's evidence and moves for a dismissal on the grounds that upon the facts and the law the plaintiff has shown no right to relief."

The Court: Let the record show the ruling on the motion is reserved. I will pass on it when I pass on the merits.

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Defendant's Case.

Thereupon, to sustain the issues in his behalf, the defendant offered the following evidence.

The Court: Do you want the record to show at this time that the testimony of Frank Richards is to be considered?

Mr. Lucas: Since you are reserving the ruling, yes, I certainly do.

FRANK RICHARDS,

called as a witness in behalf of the defendant, testified as follows (Tr. 33):

Direct Examination, by Mr. Lucas.

My name is Frank Richards; I live at Clarendon Hills, Ill.; I am Executive Secretary of the American Aberdeen-Angus Association; our office is in Chicago. I have been secretary since October 1, 1946. I have been associated with the industry since 1927. Registrations and transfers of animals by the Association are done under my supervision (Tr. 34). Under the rules of the association, it is not possible to register a calf in the name of the cow, which is in calf, until the cow itself is transferred on the books of the association.

I am now looking at Plaintiff's Exhibits 4-A to 4-O. The date of registration on our books in the name of Martin Wick is July 23, 1952. This is recorded on the reverse side of the certificates. The certificates do not show if this was the date of sale or date of delivery. Plaintiff's Exhibits 5-A to 5-K, inclusive, are calf certificates. They also show a date of transfer to Martin Wick as July 23, 1952. The dates correspond to the transfer dates of the cows.

(Tr. 36) On occasions sales are made before transfers are effected with the association. Under the rules a transfer within 30 days has a certain fee, a transfer 30 to 60 days has another fee, and over 60 days the fee varies. As between the parties themselves, we are not advised of the exact date of sale.

(Tr. 37) I have followed the prices of Aberdeen-Angus cattle from 1950 to date. In 1951, the average price of 15,000 cattle sold at public auction was about $906; in 1952, $916; in 1953, $628; in 1954, $522. The average now is about $528. I attribute the decrease in average prices to drouth conditions, which have affected demand.

Aberdeen-Angus cows have produced calves when aged up to 20 years, but that is an exception (Tr. 38). The average age will go to 15, 16, 17 years. The prime years are from four to 10 years.

From the names on Plaintiff's Exhibits 4-A to 4-O it would be hard to determine the family name of the animals. It would be hard to determine from the calves'

names, also. I am familiar with the Lady Jean and Trojan Erica families. A female called Lady Banmere was traced to the same foundation as the Lady Jean tribe. Trojan Erica has been a standard family in the breed for over 50 years (Tr. 39). Those factors enter into the value of the cattle and their descendants and related families.

Cross-Examination, by Mr. Baetz.

An owner can and at least sometimes does register a transfer months after it occurs. When he does, we reflect the true date of transfer or delivery on the certificate (Tr. 40). When the cows are not physically delivered but left on the seller's premises we simply take the evidence that is shown on the transfer of that date that the seller puts in as date of delivery. The date of delivery takes precedence over the date of sale.

I can't tell you whether there was any date of sale given in respect of Plaintiff's Exhibits 4-A to 4-O without seeing the original transfer. I didn't bring those.

In respect of a newly-born calf, when we issue a certificate stating that the original owner was thus-and-so, that indicates that the information given us in the application for the certificate was that the cow, at the time of calving, was owned by the same person. So that Exhibits 5-A to 5-K, which list Good Earth Stock Farm as the first owner of the calves, indicate that Keshner, or his agent, who sent it in, told us that at that time the mother cow was owned by him. The applications for recording and transferring came at the same time (Tr. 42). They were signed by Good Earth Stock Farm.

Plaintiff's Exhibit 7 consists of blanks furnished by the association for cattle registration. There is no space on these blanks to show the time between date of sale and date of delivery. There is no indication of a retroactive or postdated sale possible on the blanks.

(Tr. 43) The names on these certificates make it difficult for me to say what families the cattle belong to. I testified as to the Lady Jean and Trojan Erica families on direct examination, but there is nothing to be seen on these papers to indicate that the cows belonged to those families. We try to encourage owners to use those names (Tr. 44). But not enough breeders do so.

We in the association consider a certificate of registration as title to the animal, because no one could register a transfer without it. Until they were transferred to Wick July 23, 1952, Wick couldn't have done a thing with them.

(Tr. 45) The date given on the lower left of the certificates is the date of entry in our herd book. The calves were entered in our herd book August 7. The stubs say they were sent in July 23, 1952.

(Tr. 46) The figures given me on direct examination as to the average selling price of cattle were transposed in one respect. The average per head for 1951 was $916.81; the average for 1952 was $906.80. There were 15,000 sold in 1951 and 25,000 sold at auction in 1952. That price is average per animal. I have no figures on average per cow. The spread between cow prices and bull prices was not too much in those years.

I know that Prince Eric Good Earth 5 was sired by Prince Eric 2d of Sunbeamn who was sired by Prince Eric of Sunbeam, which became a very important bull, sold for $40,000 in Chicago, later sold for $36,000 and later sold for $100,000. That is a full brother to the sire of the bull that was mentioned; his uncle. But I don't know that I can answer anything in particular about Keshner's Prince Eric Good Earth 5. I do not know that his particular bull is reputed to be extraordinary in any way (Tr. 48). I don't know if it is still alive.

The small letters on the certificates show the girl who typed them. We issue the certificates when we receive the application, accompanied by the fee (Tr. 49). Up to 9 months the fee is $2; from 9 to 15, $3; from 15 to 24, $5; over 24, $50 (Tr. 50). The owner will be the man whose name appears last on the certificate. The calves we have here could not have been registered in the name of Wick, because the mothers were in the name of Good Earth (Tr. 51). Title changed from Good Earth to Wick July 23, 1952; this was based on the application (Tr. 52). If the date of sale and date of delivery on applications are different, we take the date of delivery (Tr. 53). We don't strike out the words "when sold"; it could be deceptive. In this case we did not know that the animals remained with Keshner.

Redirect Examination, by Mr. Lucas.

(Tr. 55) If a former owner retains possession, we consider the delivery date to be what he puts on the application as such.

Recross-Examination, by Mr. Baetz.

When a calf is born, the owner sends in an application for entry. This starts the animal upon our list (Tr. 58). These cows were registered by Mr. Ellis; this shows on the front (Tr. 60). It was mailed to us with Mr. Ellis' signature (Tr. 61). A calf can be sold at dam; with a cow (Tr. 62). We have been as much as 5 months behind; in 1951 we were pretty prompt (Tr. 64). When a calf is dropped, if the man owns the cow he signs the application as the breeder. I don't know who sent the applications in here (Tr. 65). I didn't mean to answer that no one other than the owner could send the application in; anyone can send an application in.

(Tr. 66) In most instances the breeder and the first owner are the same (Tr. 67). They will be the same unless on the reverse side of the application the breeding permit or bull permit is signed. That is not true here. In this case, the cows, so far as the association was concerned, still belonged to Keshner; that is right. And our certificates are based on information sent us by Keshner; that is right.

Redirect Examination, by Mr. Lucas.

This applies only to our registration; this has nothing to do with title to the animals, as far as we are concerned.

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GLEN WAPLES,

called as a witness in behalf of the defendant, testified as follows (Tr. 300):

Direct Examination, by Mr. Lucas.

My name is Glen Waples; I live near Alexandria, Mo., and did in 1952. I am a farmer (Tr. 301). I have 22 adult Angus cows. I have followed sales of Angus cattle

in Missouri, Oklahoma and Illinois. In August of 1952 I accompanied Mr. Wick and one or both of the O'Haran girls on an inspection trip of cattle at Keshner's farm near New Florence. I was on sort of a trip to buy cattle in that vicinity, partly (Tr. 302). I think Patricia O'Haran went along. My son was there also.

I heard them talking about going to look at Wick's cattle. They invited me to go along. The cattle were in a pasture. Wick accompanied us into the pasture; so did Keshner (Tr. 303). There were 25 or 30 cattle there. Keshner walked by certain individuals and pointed them out and talked about them. There were 8 or 10; might have been more (Tr. 304). Wick just talked about them looking all right, the calves looking nice. Keshner spoke about how he was handling them as his own. Wick said how well satisfied he thought they were doing. That's all I know.

I saw this group of cattle, the Ellis herd, before then (Tr. 305). I don't remember when it was. It must have been before February of 1952, for afterwards he sold them (Tr. 306). I suppose it was in the fall of 1951. He was asking $1000 a head for them. I was going to buy them, but I couldn't get the money, so the deal fell through. I was going to buy them at $1000 a head.

Cross-Examination, by Mr. Baetz.

The cows I was going to buy at $1000 a head were the cows he later sold to Mr. Voight (Tr. 307). I know which cows he sold to Voight. I'm not positive of that, no; I think it is the same.

I don't know exactly how many cows were in the Ellis herd. I think the cows that Keshner was going to ask me $1000 a head for were the cows he later sold to Voight; I'm just not positive (Tr. 308). I was talking about 8 or 9 cows when I was conferring with Keshner about buying. I thought $1000 a head was a fair price. They were of different ages. I don't remembe what ages (Tr. 309). There were probably some 4 years old, some 5, some 7 or 8. I would have paid $1000 for 12-year-olds, if they were bred to the right bull. They weren't all bred at that time, no. That had to be figured out; if we bought them, we would decide later what bull we would breed to; that was part of the agreement; Keshner and I hadn't

got into that part of it. Keshner would breed them before I took them home. It is correct to say that when I was talking about buying cattle for $1000 a head there was still something to be settled; how they should be bred and when they should be bred, that is correct.

(Tr. 310) I don't know positively that the 8 or 9 cows I was talking about were the cows subsequently sold to Voight (Tr. 311). But I think they were. I don't know whether all of them have now disappeared from Keshner's herds; I don't know anything about them now (Tr. 312). All of them were practically the same breeding.

As a cattle expert, I would say that every animal in the Ellis herd was just about the same value, so far as the families were concerned. But I wouldn't say that exactly about the individuals. If we had gone through the herd we would have picked out the ten better individuals (Tr. 313). I don't know if Keshner would have done that. I don't know whether they would have been the best or not; it would have been my opinion, maybe. No, I don't know as I would say the cows I was going to pay $1000 a head for were the best of the Ellis herd (Tr. 314). As I say, the cattle all looked about alike, and their families were the same. Yes, they looked like they were all worth about the same per head. I will say that in my opinion as a cattleman, each and every animal in that Ellis herd was worth about the same. And since there were 33 animals, I would say that the Ellis herd at that time was worth $33,000, yes.

Redirect Examination, by Mr. Lucas.

I bought a cow from Ralph Smith for $700 or $750 (Tr. 315). It was an Angus. I bred her to a bull. We still have her. We bought the bull from Good Earth (Tr. 316). I sold the calf to Ralph Smith for $4,450.

Recross-Examination, by Mr. Baetz.

I have never worked for the defendant Keshner, and never bought or sold cattle as his agent (Tr. 317). I have had some dealings, purchases of cattle, with him, but I wouldn't say a good many. I have never been in any joint enterprises with him.

KATHERINE KESHNER,

called as a witness in behalf of the defendant, testified as follows (Tr. 318):

Direct Examination, by Mr. Lucas.

My name is Katherine Keshner; I am the wife of the defendant Joe Keshner; I live at New Florence, Mo. (Tr. 319). I did not go along on the Oklahoma trip with my husband, Mr. Wick and Miss O'Haran. I don't recall any conversation about Mr. Wick purchasing cattle before they went. I remember Mr. Wick on February 9, 1952. I was present when he executed the check for $15,000. Plaintiff's Exhibit 1 is that check (Tr. 320). I wrote the words "15 bred cows" on it in the presence of Mr. Wick and Mr. Keshner.

My husband and Mr. Wick left the house to look at the cattle. That was before the check was given. They went to look at the Ellis herd, which we had for sale at that time. I did not accompany them. When they came back, the check was given.

(Tr. 321) I prepared a statement of the transaction. Plaintiff's Exhibit 2 is a copy of it. I typed it myself in the presence of Mr. Wick and Mr. Keshner. Mr. Keshner handed me a slip of paper in the presence of Mr. Wick, saying those were the cows that had been sold to Mr. Wick. I transcribed it on to this statement (Tr. 322). The original was signed by Mr. Keshner and Mr. Wick.

Martin asked Joe, "We'll sign your copy, too?" Joe said, "That isn't necessary; I have your check."

There was a discussion about the ages of the cattle. I happen also to be in the insurance business, and the discussion was brought up by Mr. Keshner that Kiki—Kiki happens to be the name that I'm known by—that Kiki would take care of insuring his cattle, and that by buying 15 head of cattle that he would put it under a group policy. Remember, I'm talking to Mr. Wick and Mr. Keshner; you understand that. Both were present. And I said, turned to the two gentlemen, I was sitting at my typewriter, and turned and said to both, I said, "Joe how old are these cattle?" because I knew that the Ellis herd had some aged cows in the herd. Joe said, "They range from two years to 11 years." I do believe was the oldest

animal. I said, "Joe, a herd policy requires 15 head to have the reduced rate of 3 percent; in that event I cannot write a herd policy on this particular group of cattle that Mr. Wick purchased. I have to have cows with the age limit of 3 months to 8 years." There was discussion then (Tr. 324). It was decided we should wait (Tr. 325). We would wait until we were sure the cows were all bred.

(Tr. 326) Shortly afterwards, I went to Hawaii with my husband. Out there, we received a letter and a postcard from Mr. Wick about his cattle. Clint Holloman was our manager at Good Earth. He was instructed by my husband to keep track of the Ellis herd; to see that they were all bred. We have a bull known as Prince Eric of G. E. the 5th. That is the bull that was to be with the Ellis herd for breeding purposes.

(Tr. 327) After my return, I saw Mr. Wick at the farm when he flew in. On that occasion he went to see his cattle. When he came back he said his cattle looked good, he was very pleased (Tr. 328). The next occasion was in July, when he came with Mary Lou O'Haran and possibly Patricia. They went to look at the cattle. I did not go with them. They discussed how the cattle looked good (Tr. 329). Mr. Wick was pleased with his cattle. The next time was when he flew in with a lady from Kansas City. He went and looked at his cattle. I did not go with him. He said the cattle looked fine (Tr. 330). The next time he came in a car, with Mary Lou O'Haran and Patricia. Mr. and Mrs Waples were at the farm. Mr. Wick went and looked at his cattle. I did not go. He said that his cattle looked very good and the calves looked very promising.

The next occasion was at our annual sale in September. He came into the house that morning (Tr. 331). He made no inquiry as to his cattle to me. We had a party at the farm after the sale, and he was there. He did not discuss cattle in my presence.

I next saw him at the Ralph Smith sale, two days after our sale (Tr. 332). He made no statement to me there about his cattle. I don't remember if I saw him again.

When my husband bought the Ellis herd the pedigrees were not available; he got them four months later. We sold four of the Ellis herd to Rosemary Danforth before

the herd were delivered to us (Tr. 333). Some of them we were not able to sell. Two were non-breeders; one died; and one was a spreader that had to be sent to the yards.

We got offers for Wick's calves in the fall of 1952, from $250 to $300. They were communicated to Mr. Wick (Tr. 334). He did not agree to sell them.

Cross-Examination, by Mr. Baetz.

I keep the books for Good Earth Farm. I have brought the records requested by the subpoena; they show the disposition of the Ellis herd (Tr. 335). These are my bookkeeping books (indicating) (Tr. 336). There were 36 animals in all (Tr. 337). My books merely show that we purchased the Ellis herd; we did not break it down then into values for the individual animals. At the end of the year, they are broken down (Tr. 338). We bought 27 cows for $11,000, and the calves went with them (Tr. 339). We set up 10 cows at the end of 1951. We sold four to Danforth, 10 to Voight, two were non-breeders and one was a spreader, and one died, and one was sold to Koster (Tr. 340). But I'm not positive the one was sold to Koster in 1951 or 1952. I think the one that died, died in 1952. That would be 17. Danforth paid $500 per head. They were the older cows, I do believe (Tr. 341). Voight paid $1,000 per head for his 10. They were a mixture, the majority older.

We paid $11,000 for the herd; by the end of 1951, we had recovered the cost and some $1,500 extra, that is right (Tr. 342). We took off the spreader and the non-breeders, and the number of head remaining was the bookkeeping basis for pro-rating $423 each to the remaining cows.

We do not have the Voight cows on our premises any more.

I represent certain companies which sell insurance on cattle (Tr. 343). These animals were not insured after February 9, 1952. They were not insured before February 9, 1952. Not all of our cattle are insured (Tr. 344). I did not bring my policies with me.

(Tr. 344) I communicated the fact to Wick that we had received offers for certain of the calves in the fall of 1952. I'm not positive whether it was me or Joe (Tr.

345). It was a telephone conversation with Wick. I don't know whether I did the talking or Joe. I presume it was Joe. I'm sure it was Joe.

The Voight cattle were left on the farm until the fall of 1954. They were on the farm for a couple of years at least. The calves sold around $250 to $300 each (Tr. 346). I don't recall of any selling for less.

The cost of keeping a cow is about $120 to $175 per year; in that general neighborhood.

I have been in association with Mr. Keshner in this business enterprise since we were married 13 years ago. I know a good deal about it, but I wouldn't say I was as capable as Joe.

Q. Do you know enough to answer me as to whether there is any income from a cow except the calf or calves that may be produced?

A. You may sell the cow at a profit.

Q. Is there any income if you retain the capital investment? They don't give milk or anything?

A. They don't give milk.

Q. So if you invest and buy one of these cows, what you get is what the calves will bring when they are produced, is that all you get?

A. You are buying a cow. You are purchasing a cow. You have a cow, don't you, for the money that you have paid?

Q. Yes, ma'am?

A. You can always sell the cow, can you not?

(Tr. 349) Q. My question, though, and perhaps it wasn't artfully worded, is that as long as you hold on to the cow, the only income is the calves they produce, in this Angus business? A. But a man knows when a breeder buys——

The Court (interrupting) Let's not argue the question. The question is very simple. Read it to her. (Whereupon the reporter read the question.)

A. That's right; you're right.

Q. Now, Mrs. Keshner, what is the usual and normal charge for breeding a cow, the service of the bull—or does it depend entirely on the bull?

A. It depends on the bull, the breeder that is behind the bull, to help back the produce—that the cow will have from that bull.

Q. These bulls you have been using on the Voight herd, and on the cows allotted to Wick, what would be the fair, usual and normal service charge for a bull of that type?

A. Ordinarily a man does not sell the service of his bull to anyone. This was merely a thing that we were doing out of friendship.

Q. You charged for it?

A. You ordinarily do not. I mean this was just a nominal sum was (Tr. 350) placed on this, because ordinarily a breeder does not sell service of his——

Q. Well, this nominal charge you placed here was $100 per service; am I right?

A. That was Mr. Keshner's agreement at the time——

Q. What I'm leading up to is this answer, and you can give it very quickly: if it costs you $175 to feed a cow for a year, and $100 to breed it, how do you make any money if the only result is a calf that sells for $250? How is that done?

A. The calf that was selling for $250 was not a fitted calf; it was just a calf at weaning time. In order to benefit more, you have got to go ahead and feed your calf out until it's a certain age.

Q. But then, madam, do you have to spend more to feed that calf? A. Well, yes, you do; any breeder knows that.

Q. I just wondered how it was possible to make money?

A. That's right, you do, you have to give it grain and more——

Q. Is it not true, Mrs. Keshner, that to justify a $1,000 cow you have to get one and breed it to a bull who will produce $600 or $700 calves; isn't that true?

A. If you would carry your calf through to age, fit a calf, it would bring that much or more.

Q. Yes, madam, and if you have a cow that is producing (Tr. 351) calves which sell in the open market for $250, to you, as a woman who knows this business, is that not evidence to you that the cow is not worth $1,000?

A. No, because you could not take a weaning calf and take it to market and sell it for any $250.

It is stated on the certificates of the calves that the sire is Prince Eric of Good Earth the 5th. We owned that bull in 1951. It was raised on our farm. I don't know whether it was ever off the farm (Tr. 352). I assume it was physi-

cally on our farm in the fall of 1951. No, I did not see it; I don't know.

It isn't the bull we sold in September of 1950. Is it?

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Plaintiff's Exhibit 22.

[Plaintiff's Exhibit 22, used only in cross-examination and not offered in evidence, was a sale catalog of the Good Earth Farm for October 7, 1950, and listed Prince Eric of Good Earth 5th, the bull claimed to have been the service bull for the cows allotted to Wick, under his number 1131250, as Lot No. 2.]

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Q. I'm going to hand you what appears to be a catalog for a sale at the Good Earth Stock Farm on October 7, 1950, and I will ask you if this is the catalog of your farm that you put out in 1950? A. Yes, I know it to be the catalog.

Q. Look at Lot No. 2.

(Tr. 253) A. Yes, I see the bull, Lot No. 2.

It may have been sold by Good Earth in 1950. I said it could have been sold. I can't say definitely without my book. I don't have my book with me. I don't have any records with me to show if it was sold.

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Plaintiff's Exhibit 23.

[Plaintiff's Exhibit 23, used only in cross-examination and not offered in evidence, was a sale catalog of the Good Earth Farm for September 22, 1951. It did not list Prince Eric of Good Earth 5th.]

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Q. I hand your what the reporter has marked Plaintiff's Exhibit 23, which is a catalog for your sale for 1951. Will you take your time, madam, and look through there and see if (Tr. 354) that was advertised for sale in 1951?

A. No, I do not see where the bull is listed in this same catalog.

It has no significance whatever, for we could have sold this bull and bought it back. I have an idea that is what was done. I am positive that the sire of these calves was

Prince Eric of Good Earth the 5th. The reason I am positive is that he was in the same pasture with the cows. I didn't say I saw him there. My records are given me by our manager, Clint Hollomon. Remember, I'm the bookkeeper (Tr. 355). I'm stating yes, this is the bull.

The information on Exhibits 5-A to 5-K, the calf certificates, is off stubs sent in to the association. They aren't in my handwriting; they are in Mrs. Hollomon's handwriting (Tr. 356). She got the information from Mr. Hollomon. He is the one who would absolutely know which bull was the sire.

None of the Ellis cattle was listed for sale in our 1951 catalog. We had the Ellis cattle then, yes (Tr. 357). I can tell why they weren't listed. They were bought to raise calves from; the calves are the produce. When we sell, we are trying to sell the produce to the other breeders, our bulls, our produce; that is our main aim in selling. The Good Earth aim is to sell the income, that's right.

I don't recall if the Ellis herd had calves between January and September, 1951. There are no Ellis herd calves listed in the 1951 catalog.

(Tr. 358) Will you state why the calf product of the Ellis herd, which was in your hands, was not offered for sale as a part of your herd?

A. Because we sell fitted cattle in our—we have the—the year before we had these calves ready, some of them ready to produce, I told you we were trying to sell our bulls and calves, bulls from Good Earth, to the people, our bulls, mainly, and the Ellis cattle when we purchased the Ellis cattle, no doubt we purchased those cattle, the calves would be by another man's bull. You understand what I mean?

Q. As a matter of fact, I suggest to you, Mrs. Keshner, isn't the real reason that they were such inferior cattle——

The Witness (interrupting): ——no, they were not——

Mr. Baetz (continuing): ——that you did not want your sale average to be reduced?

A. They were not; that is not true.

Any breeder is proud of his sale average; I don't mean us in particular, any breeder is. It's the cattle; we're proud of the cattle. Sale average goes with the cattle. We're proud of who they go to.

(Tr. 359) The page of the Aberdeen-Angus Journal shown me is our advertisement for the Good Earth sale in 1952; that is correct. It is true to say it is a matter of pride with the whole industry, not just the Keshners. It is not true to say that our interest is in offering at our annual sales our good animals so that we have a high average, and that the scrubs, of indifferent value, are peddled off between.

Mr. Baetz: Inasmuch as this is not in evidence, may I just read a short excerpt into the record. I'm referring to page 32 of the Aberdeen-Angus Journal for November, 1952. A full page ad is headed "Good Earth Stock Farm." It has a picture of a Chinese character, and a balloon for his speech, which says, "Confucius Joe say he thank you all very, very much." Underneath is a banner line: "10 Bulls, $19,925, Averaged $1,992.50; 46 Cows, $93,300, Averaged $2,093.48; and 56 Lots, $116,225, Averaged $2,075.44."

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GEORGE E. COOPER,

called as a witness in behalf of the defendant, testified as follows (Tr. 360):

Direct Examination, by Mr. Lucas.

My name is George E. Cooper; I live at Chillicothe, Mo.; I am farm manager for Ralph L. Smith, Angus breeder. We maintain a herd of Angus at Chillicothe. I have been in this work since 1923. We have 450 head at Chillicothe; we have a herd of over 100 at Lewisburg, Kas. We conduct our own sales; we had our first Angus sale in 1946. I have judged animals, I think, in every state in the Union, and in Canada.

You cannot set the worth of a cow by a simple study of the pedigree. It depends on the individuality as well, how good she is, how near to the type set up by the association (Tr. 362). I am not very familiar with the Ellis herd (Tr. 363). I have looked at Exhibits 13-A to 13-N. I wouldn't want to place a value on them without seeing the individuals. I have never based the value of an animal on pedigree alone. I can't do it (Tr. 364). There isn't anybody can do it. You have to look at the animals pretty good,

quite close. You would have to be better than I am to just pass by them.

We bought the Bar X herd in November of 1953. There were 70 head. We paid an average of $400 a head for them. We have sold 20 of them at an average of right near $1,700, and the best of them (Tr. 365). We took out probably the best six and put in my topper. They varied from cows up to cows 14 and 15 years old.

It is not unusual in the cattle business to make a profit of that kind. It's done every day. They were more or less distressed; we bought the farm, and the man we bought them from, a wealthy man, wanted to move them to us at the same time, so we just bought them.

If the pedigrees were not available, it would affect the amount I would bid for the cattle. If I didn't see the pedigree, I would be inclined to think they were all poor. I would bid less.

I have attended sales at the Good Earth Farm. I was there in September, 1952, at the sale (Tr. 367). An announcement was made prior to the sale by Bill Barton, at the auction block, that the moneyback guarantee was effective on cows that would not breed.

We sold a set of twin calves recently, within the last 30 days, for $3,500.

Cross-Examination, by Mr. Baetz.

(Tr. 368) It isn't true that you could tell the maximum value of a cow by looking at the pedigree. You got to look at her as well. I don't think it's right to pick out a fictitious case and ask me about it.

I paid $3,500 for a cow and calf within the last two years. I also paid $400, that's right (Tr. 368). I bought the $400 cows in November of 1953. Some of them had calves by their sides, that's right.

Plaintiff's Exhibit 13-A shows a pretty good pedigree (Tr. 359). It justifies a $1,000 cow, because of the cattle in the family; Exhibit 13-M, Imogene Adelia 31, could or could not warrant a $1,000 cow. It is the Lady Jean family.

I don't happen to have any Lady Jeans. If I'm not mistaken, there's an International Grand Champion that's a Lady Jean (Tr. 371). I have never had a Lady Jean in

my herds. None has ever been offered me. I just never came across one, to my knowledge. I wouldn't turn them down, if they were good.

We figure the average life span of a cow to be 14 or 15 years (Tr. 372). She starts producing as a two year old, and she usually produces until you dispose of her.

I wouldn't call an 11-year-old a young cow; she's getting to be an old cow. It depends on the individual; some cows will start down at that, and some won't; I wouldn't give a general rule.

Redirect Examination, by Mr. Lucas.

I have sold a 12-year-old cow. I don't know the highest price I got for a 12-year-old. I sold one for $2,000 less than two months ago (Tr. 374). I tried to buy a 12-year-old recently for $25,000 but didn't get her.

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CLINT HOLLOMON,

called as a witness in behalf of the defendant, testified as follows (Tr. 374):

Direct Examination, by Mr. Spencer.

My name is Clint Hollomon; I am Mr. Keshner's herdsman; I take care of his cattle. I know Prince Eric of Good Earth 5th, Association No. 1131250; I am familiar with him (Tr. 375). He was cataloged for the 1950 sale, and went through the ring; but the buyer never took him.

The bull shown as the sire of the calves on Plaintiff's Exhibits 5-A through 5-K is the same bull, Prince Eric of Good Earth 5th. That bull has only been off the Good Earth Farm for about two hours, when he was taken for sale and as a reference sire at the Triple A ranch. It was not over two hours.

(Tr. 376) This bull was in the pasture with Wick's cattle at all the time that they were on the place and during their breeding season.

Cross-Examination, by Mr. Baetz.

Prince Eric of Good Earth 5th is dead, now. I didn't shoot him; he died. I don't know of what infirmity; we

had veterinarians from the University to examine him before he did die. He died of disease. We did not have an autopsy (Tr. 377). It was in the spring of 1953.

The application blanks, Plaintiff's Exhibit 7, were made out by my wife. She helps. I gave her the information as to who the sire of the calves was. I gave it to her because I actually knew that this bull was in the pasture with the cows.

He was in there continuously, and no other bull was. We don't use artificial insemination (Tr. 378). Prince Eric of Good Earth 5th was continuously with the cows, and no other bull was, and that is the reason I am sure he was the sire.

I have now looked at Plaintiff's Exhibits 4-A to 4-O, the certificates for the cows that dropped the calves, and I don't see that Prince Eric is named as the service bull (Tr. 379). I am sure no other bull was with them (Tr. 380). I don't know why he isn't shown on the certificates. I cannot explain it.

I don't know what the bid for Prince Eric was, and I don't know who the bidder was.

Mr. Lucas: We rest.

Mr. Baetz: No rebuttal.

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Defendant's Exhibits A to D Offered and Received in Evidence.

Mr. Lucas: We would like to offer Defendant's Exhibits A, B, C and D.

Mr. Baetz: No objection.

The Court: They are admitted.

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Defendant's Motion for Directed Verdict Filed and Presented and Overruled.

(Tr. 382) The defendant here offered his motion for directed verdict, as follows (caption and signatures omitted):

"Defendant moves the Court to direct a verdict in favor of the defendant on all the evidence in this cause on the grounds that upon the facts and the law the plaintiff has shown no right to relief."

(Tr. 383) The motion was overruled by the Court.

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Defendant's Exhibit E Admitted Into Evidence by Stipulation.

(Tr. 384) By stipulation, Defendant's Exhibit E was later admitted into evidence. It consisted of a certified copy of the judgment in the Magistrate's Court in the case of Keshner vs. Wick, the agister's lien foreclosure suit.

And this was all the evidence in the case.

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Memorandum Opinion.

(Filed August 17, 1956.)

The plaintiff in this action seeks to recover some $30,000 for breach of contract and breach of a fiduciary duty. Jurisdiction is founded upon diversity of citizenship, plaintiff being a citizen of Illinois and defendant a citizen of Missouri.

The testimony disclosed that the plaintiff, a man in his thirties, was at the time of the transaction in question manager of a manufacturing enterprise in Highland, Illinois, devoted to the manufacture of pipe organs. The defendant, a somewhat older man, operated a stock farm devoted to the breeding, trading, selling and maintenance of Aberdeen-Angus cattle near New Florence, Missouri. The defendant's farm was known as the "Good Earth Stock Farm," and he often referred to himself as Confucious Joe, operating the farm under a Chinese motif.

The plaintiff and defendant became acquainted through a young lady, one Mary Lou O'Haran, who was one of the plaintiff's employees. In the early part of 1952 the plain-

tiff, defendant and Mary Lou, made a trip to Oklahoma to attend an Angus sale, and at the sale purchased an Angus cow for $3,000, each of the three putting up $1,000 on the purchase price. During the course of the trip it developed that the plaintiff, for the purpose of investment, was interested in buying some Angus cattle. Several days after the trip to Oklahoma, on February 9, 1952, the plaintiff went over to defendant's farm and purchased 15 Angus cows from defendant for $15,000, which the plaintiff paid for at that time. Mary Lou was with the plaintiff at the defendant's farm when the purchase was made.

At that time the defendant pointed out to plaintiff the cattle that he was purchasing, indicating that they had on double-neck chains. The cattle were to be left on the defendant's farm and the defendant was to board them for an indefinite period of time at a reasonable rental, which was not to exceed $200 per year per cow, for which he was to be paid by the plaintiff at least once every six months or a year.

The testimony clearly disclosed that the plaintiff had little knowledge of cattle, Angus bred or otherwise, and in fact was so afraid of cattle that he would not get close to them unless there was a fence between him and the cattle.

Between February 9 and September 20, 1952, the plaintiff made several trips to defendant's farm to look at his cattle, usually in company with Mary Lou or some other young lady. The testimony also shows that shortly after the transaction in question defendant took a trip to Hawaii, and that not long after his return the 15 cows in question were transferred to the American Aberdeen Angus Breeders Association to the name of the plaintiff, and that several calves that had been born to said cows were also registered in the plaintiff's name.

On September 20, 1952, the defendant conducted his annual sale, or at least one of his sales, which the plaintiff attended. After this sale at the defendant's farm the plaintiff attended a sale at or near Columbia, Missouri, and one near Kansas City, Missouri. At the conclusion of these sales the plaintiff determined that the cattle that he had

purchased were not worth what he had paid for them, that the defendant had misrepresented the facts to him, and he asked the defendant for the return of his $15,000, which the defendant refused to do.

Considerable correspondence and conversation took place between the parties, and finally the defendant ordered the plaintiff to take his cattle off of defendant's farm, which the plaintiff refused to do, and defendant made a demand against the plaintiff for some $6,000 for feed and breeding purposes, which the plaintiff refused to pay. Thereafter, in August of 1953, the defendant filed suit for an agister's lien, upon which he was given judgment for $6,231.50 by a Magistrate in Montgomery County, Missouri, with the 15 cows and their 14 calves being sold by the sheriff for $6,650 at the execution sale, and, after the costs and fees, totalling $838.50, were paid, the defendant receiving $5,811.50 on his $6,231.50 judgment.

Thereafter, plaintiff brought suit in this court. The plaintiff's suit is based on two theories—one that the defendant had a fiduciary duty toward the plaintiff, which he breached, and two, a breach of contract.

With respect to the contract, except for the $15,000 check and a so-called statement (Exhibit 2), which plaintiff denies having seen before purchase, there was nothing in writing at the time of the purposed contract to evidence such a contract. The understanding between the two parties was an oral understanding, and no third party overheard it being reached. Both parties agree that the purchase price was $15,000 for 15 Angus cows, which had been bred, and that the defendant would for an indefinite period of time keep the cattle at a cost of not more than $200 per year per cow to the plaintiff. In addition, the plaintiff would have the court believe that for $1,000 the defendant contracted to sell him cattle worth $2,000 a head, guaranteeing that at any time the plaintiff was dissatisfied with his investment the defendant would return his money in full. Finally, plaintiff claims that defendant represented that the plaintiff would realize 25% return per annum on his investment.

The defendant denies such representations, and the testimony would indicate that no such representations were made by the defendant to the plaintiff. After hearing the testimony of the various witnesses in the case the court does not doubt that the defendant may have puffed his wares. Indeed, the court is of the opinion that the raisers of registered Angus are seldom, if ever, short in their claims with respect to them. Nevertheless, the testimony surrounding the transaction would indicate that the defendant did not make the representations which the plaintiff alleges in order to make the sale. The plaintiff had just finished attending several sales, at which he had seen registered Angus bring prices substantially in excess of $1,000, and had recently returned from Oklahoma where he had purchased a one-third interest in an Angus cow for $1,000. He also knew that Mary Lou O'Haran, a young lady in whom he had great confidence, had purchased some Angus cattle from the defendant. These facts, considered with all the other testimony, lead the court to the conclusion that the plaintiff may have made certain surmises but that defendant did not represent the cows to be worth $2,000 per head, or guarantee the plaintiff to return his money to him at any time when he was not satisfied, or guarantee him a 25% return on his investment. The testimony indicates, however, that the defendant did state that he thought the plaintiff could make a 25% return each year on his investment. The plaintiff appeared to be perfectly satisfied with his bargain from February until late September, when, with the price of cattle down, he suddenly became very dissatisfied. He made much of the fact that the herd out of which the 15 cows came had been purchased by the defendant for some $11,000, and that there were 36 head of cattle in the herd, and that, therefore, under no circumstances were they worth $1,000 a head.

The court is not familiar with the details of the sale which occurred many months before, wherein the defendant acquired the 36 head of cattle known as the Ellis Herd for $11,000, but the testimony indicates that ten cows out of this herd were sold to one Louis Voight in late 1951 for $1,000 each, and that one was sold to Elmer Coster for $1,000. Four of the herd were sold to Rosemary Danforth

for $500.00 each, but this sale was made by the defendant at the time he purchased the herd and before he had even moved the herd to his farm. The testimony indicates that the 15 cows which the plaintiff purchased from the defendant were comparable to the ten which had been purchased out of the same herd by Louis Voight, who, like the plaintiff, had left the cattle on the defendant's farm to be boarded by the defendant.

It is axiomatic that where there is a dispute between the parties as to the terms of the contract, the burden rests upon the plaintiff to prove his own case. Under the testimony here the court is of the opinion that he has not only failed to do so, but that the evidence discloses that the 15 cattle were purchased by the plaintiff from the defendant for $1,000 each, that at the time of the purchase the plaintiff was shown what he had purchased, and that the defendant did not represent to him that the cattle were worth $2,000 each or that his money would be returned to him if he was dissatisfied with the deal at any time, or that he would make a 25% return upon his investment each year.

The plaintiff is not entitled to the return of his $15,000 or to any punitive damages with respect to the transaction. There is no evidence of fraud as to the sale in question.

It is unfortunate that the parties were unable to reach some agreement as to the disposition of the herd, even though it might not of necessity have disposed of the plaintiff's claim in this case. The evidence shows that the defendant advised the plaintiff of the coming sale of the cattle. At that time the plaintiff had possession of registrations with the Angus Breeders Association, without which the cattle could not be sold as registered cattle, and when it was finally necessary for the defendant to bring an agister's lien action to recover his board bill and the cattle had to be sold to pay said bill, the cattle were sold at an execution sale conducted by the sheriff of Montgomery County. Seldom, if ever, are such sales conducive to the bringing of the best price for cattle, and that is par-

ticularly true in this instance, where, since the plaintiff had the certificates of registration, the cattle could not be sold as registered. This single fact alone would have a great effect on the price. In addition, the testimony indicates that between February of 1952, when the plaintiff purchased the cattle, and August of 1953, when they were sold by the sheriff, a drouth condition existed in a widespread area, and the cattle prices had been reduced, being in general worth much lower in August of 1953 than they were in February of 1952.

There is one further aspect to this case. The testimony indicates that the defendant secured by default an agister's lien for $6,231.50, which, despite defendant's contention, this court does not feel is in all respects res judicata. When the cattle were sold by the defendant to the plaintiff, they were sold as bred cattle, and the defendant guaranteed each of the 15 cows to be safe in calf, which meant that if a cow did not conceive it would be replaced with a cow of equal value, or the purchase price of the particular cow would be returned. Nevertheless, in the petition to enforce the agister's lien, the defendant (plaintiff in that action) sought and was given judgment for a separate item of $1,500 for breeding the 15 cows in 1952 over and above the maximum charge for boarding the cattle, which defendant represented would be $200 per head per year. The defendant's claim in the magistrate court was that the judgment was $10 per month per cow with an additional charge for breeding, despite the fact—to emphasize the point—that the cattle were sold to plaintiff as bred cattle. The defendant was entitled to the $2,700 set up in his petition for the agister's lien for the upkeep of the cattle. The defendant realized out of the sale after the payment of costs, $5,811.50, and since his bill against the plaintiff in this instance under the original purchase contract between the plaintiff and the defendant was properly $2,700 as set up in his petition under the agister's lien, the defendant is entitled to the difference between $5,811.50 and $2,700, or the sum of $3,111.50, being the amount that the cattle brought at the execution sale, less the cost of the sale, less the $2,700 to which the defendant was entitled.

Judgment will accordingly be for the plaintiff for the sum of $3,111.50. Attorneys for the defendant will prepare the findings of fact, conclusions of law and judgment, and submit same to plaintiff's attorney for approval as to form, and to the court for entry.

ROY W. HARPER,
U. S. District Judge.

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Findings of Fact and Conclusions of Law.

(Filed October 19, 1956.)

The court makes the following findings of fact and conclusions of law:

Findings of Fact.

1): The plaintiff being a resident of Highland, Illinois, the defendant being a resident of Montgomery County, Missouri, and the plaintiff's action involving a claim for $30,000 actual damages and a similar amount for punitive damages, this action having been brought upon the theory of diversity of citizenship, this court has jurisdiction.

2): At the time of the trial of this action, and for some years prior to 1951, the plaintiff, Martin M. Wick, was engaged in the business of manufacturing pipe organs for churches, the name of his company being Wick Organ Company, located in Highland, Illinois, where the plaintiff resides and operates his business. At all of said times, a young woman, Miss Mary Lou O'Haran, resided with her sister, Patricia O'Haran, on a farm about four miles from Highland, Illinois, and in 1950, Mary Lou O'Haran began buying Aberdeen-Angus cattle, and at the time of the trial she owned six females and a bull and calves of said breed of cattle. Both Mary Lou and Patricia O'Haran were, at all times mentioned in the evidence, employed by the Wick Organ Company. The defendant, Joseph Keshner, has been in the cattle business since 1918, and has, since about fifteen years prior to the trial of this case, specialized in the business of buying, breeding, raising and selling Aberdeen-Angus cattle. The plaintiff had little knowledge of

the cattle business at the time of the making of the contract involved in this case.

3): In December, 1951, the plaintiff became interested in purchasing Aberdeen-Angus cattle as an investment. In that month the plaintiff and Mary Lou O'Haran attended the International Stock Show at Chicago. Mary Lou O'Haran introduced the plaintiff to the defendant at that time. In the early part of January, 1952, the plaintiff and Mary Lou O'Haran, by automobile, drove to defendant's Good Earth Stock Farm, near New Florence, Missouri, and the defendant went with them on a trip to Aberdeen-Angus sales at Miami and Tulsa, Oklahoma. On that trip, the plaintiff, Mary Lou O'Haran, and the defendant jointly purchased an Aberdeen-Angus cow for the price of $3,000, each paying $1,000 of the purchase price. On the way to and from Oklahoma, the plaintiff and defendant talked about cattle, but there was no agreement about the purchase involved in this case.

4): On their return from Oklahoma, the plaintiff and Miss O'Haran stopped overnight at the Good Earth Stock Farm. At that time plaintiff and defendant talked about Wick purchasing Aberdeen-Angus cattle. Later, on February 9, 1952, the plaintiff went to the Good Earth Stock Farm and purchased 15 Angus cows for $15,000 and gave the defendant a check for same, on which there was a memorandum, "15 bred cows."

5): The cattle sold to Wick were out of the herd known as the Ellis herd, which consisted of 36 head of cattle purchased by defendant a year or more before the sale in this case. The evidence shows that even before delivery of this herd to defendant he had sold four animals to one Rosemary Danforth at $500 each. Of the remaining 32 head of cattle he sold 10 cows to a Mr. Voight for $1,000 per head, which sale was made prior to the sale to plaintiff, and the defendant was keeping and handling that herd for Voight at the time of the sale to Wick, thus leaving 22 head of the Ellis herd unsold. Another cow was sold to Elmer Koster for $1,000, two were non-breeders, one cow died, and one was "known as a spreader that had to be sent to the yards". 15 of the remaining cows were sold by defendant

to plaintiff, consisting of six heifers, which were approximately two years of age, and nine cows, ranging in age from four to eleven years. On February 9, 1952, when the sale was closed, defendant Keshner pointed out to plaintiff what animals he was selling to him, said animals having on double neck chains. The plaintiff did not wish to get too close because he was a little afraid of the cattle. At that time they were possibly 50 feet from the animals. The court further finds that on the occasion of the inspection of the animals on February 9, 1952, Mary Lou O'Haran was with plaintiff and the defendant, though she was not present when the deal was closed.

6): Under the terms of the sale of the 15 cows to Wick, the plaintiff having no farm on which to keep the cattle, it was agreed that the defendant would board the cows and their increase for an indefinite time, until the plaintiff could find a place for them. The evidence shows that the plaintiff had looked at farms in the vicinity of Montgomery City, Missouri. The original 15 cows purchased by plaintiff had been bred to an Aberdeen-Angus bull, and if any of such cows should not conceive or be barren, the defendant would replace such animal or animals, or refund the purchase price thereof. The court further finds that under the agreement for the boarding of the cows the defendant stated that the cost of the boarding would be not more than $200 per head per annum, and plaintiff would pay for the same every six months, or yearly.

7): Glen Waples, an Angus cattle dealer, of Alexandria, Missouri, stated that in August, 1952, he was in the vicinity of the Good Earth Stock Farm while on a cattle-buying trip, and on that occasion he went with Keshner, Wick, and one of the O'Haran sisters to see Wick's cattle in the pasture where they were located. On that occasion, Keshner pointed out certain cattle belonging to Wick in a group of 25 or 30 cattle, and Wick talked about the cattle looking all right. Waples testified that he looked at these cattle in the late fall of 1951, and he was going to buy nine of the Ellis herd at $1,000 a head, but was unable to make necessary financial arrangements, and that the price of $1,000 per head was a fair price for the cattle.

8): While the defendant was in Hawaii, and after the defendant's return in the latter part of May or the first part of June, 1952, the plaintiff made numerous trips to the Good Earth Farm, and went out to see the cattle several times, being accompanied by Mary Lou O'Haran, and at other times by cattlemen. On the occasions when he would visit the Good Earth Farm; the plaintiff would refer to the cattle as his cattle, and expressed no dissatisfaction with the cattle. Such was the situation until the defendant received plaintiff's letter of September 24, 1952.

9): There was a widespread drought in 1952, and by September the effect of such drought upon prices of cattle sales and of feed, under the evidence and as a matter of common knowledge, was no doubt apparent. The plaintiff testified that after attending several sales in the latter part of the summer and in September, he began to worry about his investment in the cows purchased from Keshner. On September 24, 1952, he wrote a letter to defendant (Plaintiff's Exhibit 9), expressing his feeling as to the value of the cattle, and suggesting that it would be best for the defendant to make a refund to the plaintiff. The plaintiff again wrote the defendant on September 29, 1952 (Plaintiff's Exhibit 11), asking that a refund be made, as suggested in plaintiff's letter of September 24, 1952 (Plaintiff's Exhibit 9). On October 1, 1952, defendant wrote the plaintiff (Plaintiff's Exhibit 13), and in answer to a suggestion in plaintiff's letter of September 29th that defendant had not sent the plaintiff the registry certificates on the cattle, defendant reminded the plaintiff of the fact that he had kept the certificates so that he could register the calves when born, as he was keeping the animals for plaintiff. On October 11, 1952, the defendant sent the registry certificates (Plaintiff's Exhibits 4-A to 4-O, inclusive, covering the cows, and Plaintiff's Exhibits 5-A to 5-K, inclusive, covering the registered calves), to plaintiff in a registered envelope (Plaintiff's Exhibit 6), and they were kept by Wiek until the trial of this case. On December 13, 1952, the defendant wrote the plaintiff, stating that he had a buyer who would take all of plaintiff's calves, and asking for prices on the same (Defendant's Exhibit A). The plaintiff replied by letter of December 19, 1952 (Defend-

ant's Exhibit C), stating that he did not in any way wish to affirm the sale of the original cattle, and was interested only in a complete refund of his investment. Prior to August 9, 1953, the defendant sent statements to the plaintiff for the boarding of the cattle, and plaintiff refused to pay the bill. When plaintiff refused to pay the boarding of the cattle, the defendant ordered the plaintiff to get his cattle.

10): Being unable to obtain payment for the boarding of the cattle or to get the plaintiff to take the cattle off of defendant's farm, on August 9, 1952, the defendant filed suit for an agister's lien, seeking a judgment for the keeping, feeding and breeding of plaintiff's cattle. The amount sued for in that suit was $6,231.50. Service was by publication and by sending a copy of the petition in said suit by registered mail to the plaintiff at Highland, Illinois, with return receipt shown by the evidence. Wick did not appear in the agister's lien suit and the plaintiff therein obtained judgment for $6,231.50. It appears from the testimony and Plaintiff's Exhibit 18, that two of the first 1952 calves had died, and only 13 of such calves were sold at the agister's lien sale. In a list of the animals sold under execution (Plaintiff's Exhibit 19), it appears that 13 cows were sold with calf, each cow and her calf being sold as one animal.

11): The court finds that the defendant secured, by default, an agister's lien judgment for $6,231.50 in the Magistrate Court of Montgomery County, Missouri, for labor, feed, care, mineral, salt, training and keep of the 15 cows and 13 calves named in the petition for agister's lien.

12): The court finds that defendant realized out of the sale of the cows, calves and yearling calves, after payment of costs, the sum of $5,811.50, pursuant to a sheriff's sale of the cattle, against which the agister's lien was claimed. The court further find that this judgment is not res judicata, and that the defendant is entitled to $2,700, being the item claimed for the upkeep of the cattle as above set out, but no more. The court finds the amounts found by the Magistrate to be due the defendant are not due the defendant under the contract of sale, except for the $2,700, and accordingly finds that plaintiff is entitled to judgment

against defendant in the sum of $3,111.50, being the amount by which the court finds the agister's lien judgment was excessive, on the second count or cause of action of the complaint.

13): On the issues of fraud under each cause of action set forth in plaintiff's complaint, the court finds that there was no fiduciary or confidential relationship between the plaintiff and the defendant in the making of the contract for the sale of the cattle involved. This is not a case where money is turned over to another to invest, as intimated in the complaint. The defendant offered to sell to the plaintiff 15 cows, ages not specified, and of the cows delivered and paid for, six were heifers, and nine were older cows ranging from four to eleven years of age. The proposition was accepted, and the plaintiff paid for the cows, and they were segregated and identified by double chains.

14): The defendant represented to the plaintiff that he was earning approximately 25% on his investment in the cattle business, but the defendant did not guarantee to the plaintiff that he would have a 25% return on his investment and that the investment would be without risk.

15): The defendant did not represent to plaintiff that the initial costs of boarding the cattle would be carried on by the defendant until the investment had attained a profitable status by reason of the production of progeny and the sale thereof.

16): The defendant did not represent that the 15 cattle he would sell the plaintiff were worth $2,000 per head, but that he would sell them to plaintiff for $1,000 per head.

17): The court finds that the defendant did allot to the plaintiff the 15 cows sold to him, and finds that the identification by double neck chain numbers was a sufficient segregation, in view of the fact that the defendant was to board the herd for the plaintiff.

18): The plaintiff had ample opportunity to check the ages and value of the cattle if he did not know the ages and value thereof, but waited until September 24, 1952, to suggest his dissatisfaction with the sale. At no time did

the plaintiff ever offer to return the registration certificates on the cows and calves.

19): The court finds that the price obtained for the cattle at the agister's lien sale does not establish that the cattle were not worth $1,000 per head on February 9, 1952. Droughts had intervened both in the summer of 1952 and 1953, which affected the value of cattle, and because the plaintiff did not return or offer to return the registration certificates on the cattle to the defendant, the cattle could not be sold as registered cattle, and which further affected the amount realized at the agister's lien sale.

## Conclusions of Law.

1): The burden of proof is on the plaintiff to establish fraud and misrepresentations alleged in the first count or cause of action in his complaint, by clear and convincing evidence, and the court having found that such allegations of fraud and misrepresentations are not sustained by the evidence, the judgment should be for the defendant and against the plaintiff on said first cause of action.

2): The allegations of fraud and misrepresentations in the second count or cause of action of the complaint not having been sustained by the evidence, the plaintiff is not entitled to recover on said second cause of action, on the ground of breach of contract by fraud and representations alleged in said second count.

3): The court having found that the claim of the defendant Keshner, plaintiff in the agister's lien suit, in the sum of $6,231.50, was excessive, and that said Keshner was entitled to only $2,700 for boarding said cattle from February 9, 1952, to August 9, 1953, and that the amount recovered by said Keshner in said agister's lien suit was excessive by $3,111.50, the plaintiff herein is entitled to judgment against the defendant in the sum of $3,111.50, on the second count of his complaint, and judgment should be entered accordingly.

ROY W. HARPER,
U. S. District Judge.

## Judgment.

(Filed and Entered October 19, 1956.)

This cause having been heard and tried by the Court, and submitted on briefs by the respective parties, upon consideration thereof, the Court finds for the defendant on the first cause of action of the complaint herein, and that the plaintiff has failed to sustain the allegations of fraud set forth in the said first cause of action, and has also failed to sustain the allegations of fraud in the second cause of action in said complaint.

The Court further finds that the judgment in the agister's lien suit, mentioned in the complaint and in the evidence, was excessive by the sum of Three Thousand One Hundred Eleven Dollars and Fifty Cents ($3,111.50), and that the plaintiff is entitled to recover such excess under the second cause of action of said complaint.

It is therefore ordered and adjudged by the Court that the first cause of action of plaintiff's complaint be dismissed, and that the plaintiff recover of and from the defendant, under the second cause of action of said complaint, the said sum of Three Thousand One Hundred Eleven Dollars and Fifty Cents ($3,111.50), together with the costs of this action.

ROY W. HARPER,
Judge, United States District Court,
Court No. 2.

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## Defendant's Motions to Amend Findings and Judgment and for New Trial on Count II Filed and Overruled.

On October 29, 1956, defendant filed a motion to amend the findings and judgment and a motion for a new trial in respect of the issues under Count II of the complaint. Both were overruled by the Court on November 15, 1956. Since neither motion nor the ruling thereon is relevant to the issues on this appeal, pursuant to the rules of the Court of Appeals they are omitted from this printed record.

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## Notice of Appeal.

(Filed November 16, 1956.)

Notice is hereby given that Martin M. Wick, plaintiff above named, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the final judgment entered in this action by the District Court of the United States for the Eastern District of Missouri, Eastern Division, on October 19, 1956.

November 16, 1956

EMERSON BAETZ,
Attorney for Martin M. Wick (Plaintiff), Appellant,
Address: 200 West Third Street,
Alton, Illinois.

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## Designation of Record on Appeal.

(Filed November 16, 1956.)

The appellant Martin M. Wick, plaintiff above named, now designates all the original files of this cause in the District Court of the United States for the Eastern District of Missouri, Eastern Division, and a complete transcript of the evidence, including proceedings at the trial of this cause on March 3 and March 4, 1955, for inclusion in the record on appeal.

November 16, 1956

EMERSON BAETZ,
Attorney for Martin M. Wick (Plaintiff), Appellant,
Address: 200 West Third Street,
Alton, Illinois

I hereby certify that on this November 16, 1956, I served the foregoing Designation of Record on Appeal on Messrs. Finley, Lucas & Arnold and Mr. George A. Spencer, attorneys for the defendant, by depositing true copies thereof in the United States mail, first class postage duly prepaid,

addressed respectively to 2155 Railway Exchange Building, St. Louis 1, Missouri, and Columbia, Missouri.

EMERSON BAETZ.

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Docket Entries.

Note: Pursuant to the rules and suggestions of the Court of Appeals, only such docket entries as are deemed relevant to the appeal are here set forth. Others are omitted.

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| Oct. 15, 1953 | Complaint filed. |
| Dec. 21, 1953 | Answer filed. |
| Feb. 21, 1955 | Defendant's amended answer filed by leave. |
| Mar. 3, 1955 | Parties appearing and announcing ready for trial, final hearing of cause before the Court commenced but not concluded and further proceedings postponed until tomorrow at 9:30 a. m. |
| Mar. 4, 1955 | Again come parties; whereupon final hearing of cause before the Court resumed and at conclusion of plaintiff's case, motion of defendant for dismissal filed, submitted and ruling thereon reserved. Thereupon the introduction of evidence in behalf of defendant is commenced and concluded. Plaintiff granted 15 days after receipt of transcript of hearing from court reporter within which to submit brief; defendant granted 15 days thereafter in which to submit answering brief, and plaintiff 10 days thereafter in which to submit reply brief; and upon receipt of all foregoing briefs cause to be taken as submitted. |
| June 24, 1955 | Pursuant to stipulation of parties filed and presented, submission of cause vacated, cause reopened and Defendant's Exhibit E attached to such stipulation admitted in |

evidence. Defendant's motion for directed verdict at close of all the evidence taken as refiled and resubmitted, and cause thereupon resubmitted.

Aug. 17, 1956 Memorandum opinion of the Court determining issues submitted on final hearing and awarding plaintiff judgment in the sum of $3,111.50 and directing attorneys for defendant to prepare findings of fact, conclusions of law and judgment and submit same to plaintiff's attorney for approval as to form, and to the Court for entry. Copies of notice mailed by Clerk to counsel.

Oct. 19, 1956 Findings of fact and conclusions of law filed and judgment in accordance therewith filed and entered, dismissing first cause of action of plaintiff's complaint and awarding judgment against defendant under plaintiff's second cause of action in sum of $3,111.50 and costs. Transcript of proceedings had on trial beginning March 3, 1955, filed by official court reporter.

Oct. 29, 1956 Defendant's motion for new trial on second cause of action in plaintiff's complaint, with request for oral argument, filed. Motion to amend findings of fact, conclusions of law and judgment, with request for oral argument and memorandum in support, filed.

Nov. 15, 1956 Order filed overruling defendant's motion for new trial on second cause of action of complaint and overruling defendant's motion to amend findings of fact, conclusions of law and judgment.

Nov. 16, 1956 Notice of appeal of plaintiff to the United States Court of Appeals, Eighth Circuit, from final judgment entered October 19, 1956, filed. Copy of said notice of appeal mailed by the Clerk of the Court to Messrs.

Finley, Lucas & Arnold and George A. Spencer, attorneys of record for defendant. Appellant's appeal bond in the sum of $250.00 filed. Designation of contents of record on appeal filed by appellant.

Nov. 20, 1956 Original notice of appeal, together with two certified copies of docket entries delivered to Clerk, United States Court of Appeals, Eighth Circuit.

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JOHN T. FEY, Clerk

# SUPPLEMENTAL RECORD OF APPELLEE.

## United States Court of Appeals.
FOR THE EIGHTH CIRCUIT.

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No. 15,686.
CIVIL.

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MARTIN M. WICK,
APPELLANT,

vs.

JOSEPH KESHNER,
APPELLEE.

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI.

FILED
JAN 20 1957

# United States Court of Appeals
## FOR THE EIGHTH CIRCUIT.

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**No. 15,686.**
CIVIL.

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## Appellee's Supplement to the Printed Record.

### Plaintiff's Evidence.

Appellant has criticized all findings of fact excepting finding of fact 11, and has challenged the sufficiency of evidence to support substantially all of the findings of fact. In view of the foregoing, appellee hereby submits additional portions of the record as he deems essential for consideration by the Court in deciding the case, and which were omitted in appellant's record or inaccurately stated therein.

Whenever appellant's record is hereinafter referred to, it will be designated as "R.," and whenever the transcript of the record is referred to, it will be designated as "Tr."

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Witness JOSEPH KESHNER (direct examination):

R. 15, at the end of the quotation from Tr. 16:

Q. Did you show the individual animals? A. I did.

In lieu of the first sentence at top of R. 16, Tr. 17:

Plaintiff's Exhibit 2 is a carbon copy of the statement that I handed Wick. Wick got a statement and we both signed it.

In lieu of the second sentence at the top of R. 16, the following:

The copy is not signed or dated, the check was the receipt.

R. 16, Tr. 19, at beginning, to be added:

The reason why we didn't use these tattoo numbers was that these cows were guaranteed safe with calf, and they were not all safe with calf at that time, and that is the way we sell cattle. Should they not conceive, another cow would have to be substituted or money refunded if they didn't conceive.

P. 16, commencing of recital of Tr. 21:

Between time of purchase and our departure, Wick had been out to see his cattle.

R. 19, Tr. 30, immediately above "Plaintiff's Exhibit 7":

I did not recollect telling the Association that the calves were owned by me when they were born.

R. 19, Tr. 31-32, in lieu of the last sentence in the third paragraph from the bottom:

They show the breeder of the calves was Good Earth and there are ditto marks under some showing the owner was Good Earth. Some don't have it.

R. 19, commencing recital of Tr. 69, as follows:

The calves were dropped between sale and transfer.

R. 20, first sentence at top of page:

They were sold to Wick in February (Tr. 76), but they had to stay there until they were safe in calf. I didn't consider myself the owner after February 9th; the check shows that.

R. 21, Tr. 74. In lieu of Tr. 74 as set forth:

The reason I held onto the certificates was because I needed them while looking after Wick's cattle. I had to have the dam and the sire to register the calves. When Wick did not want me to keep the cattle I sent him the certificates. I got no other letter asking for them. I got no telephone call asking for them.

R. 21, Tr. 75:

Q. Mr. Keshner, did you answer that letter of September 24 that Wick sent you, asking for his money back?

A. Not unless you have it.

The Court: Well, now, if you don't know, just say so.

The Witness: I don't know, Judge.

(Tr. 76) The Court: That is like saying "I'm telling the truth unless you can prove I'm lying."

The Witness: Joe don't lie.

R. 25, bottom of page, add the following, Tr. 81:

Q. Oh, because you wanted them. Did you see any obligation (Tr. 82) on your part to send those pedigrees to the man who paid you $15,000 some eight or ten months before?

A. He could have had them any time he wanted them.

Q. You never sent them to him? A. No reason.

Q. You kept them there? A. No reason to.

Q. You kept them there until he wanted his money back? A. Taking care of his cattle.

R. 26, in lieu of Tr. 83 and 84:

Q. Now, Mr. Keshner, these fifteen cows that were sold by you, or allotted to Mr. Wick by you, were fifteen out of a herd of thirty-six that you had bought approximately one year previous from J. P. Ellis of Montgomery City, Missouri, is that correct? A. They were, yes.

I paid Ellis, for all 36, for cows and calves, the sum of $11,000.00. I call it a calf when it is still nursing (Tr. 84). Some were still nursing. I kept records of their ages.

R. 28, Tr. 91, to read as follows:

Exhibits 4-A to 4-O are the certificates for the 15 cows, not calves, received from Ellis when we purchased the herd, and remained in our possession all the time from then until we sent them to the association in July of 1952 (Tr. 92). I can't tell you whether we got Exhibits 13-A to 13-N, the pedigrees, from Ellis, or whether we made them up. We make up pedigrees. We don't send them out. That is for our information, pedigrees.

R. 29-33. Because of numerous omissions from the testimony of witness Keshner on cross-examination, redirect examination, recross-examination, and redirect examination, so as not to interfere with the continuity we here reprint the same with the insertions:

I was introduced to Wick in Chicago by Mrs. O'Haran, who is the mother of Mary Lou O'Haran previously referred to. I had known Mary Lou before. Wick and I talked about cattle then. I didn't see Wick again until January of 1952, when I was asked to join them to go down to Oklahoma to attend a sale of cattle. We went to Oklahoma (Tr. 95). I think Mary Lou O'Haran con-

tacted me then. They came and picked me up and we attended a couple of sales in Oklahoma.

In the evening, after we came back from Oklahoma, I discussed with Wick the purchase of cattle from me. That was the first time we discussed it in detail; we had talked about cattle in a general way before (Tr. 96). I told him I could furnish him bred cows for $1,000 apiece, guaranteed bred. By "guaranteed bred" I meant a cow that would conceive and have a calf, drop a calf. If a cow does not have a calf or does not conceive you have to replace it with a cow of equal value or refund the money.

On February 9, 1952, Wick was with me in the afternoon, or something like that; I don't know how many hours.

Q. Did you at any time represent to him out of what particular herd, prior to February 9, did you represent to him at any time out of what particular herd of cattle you were going to select the ones that you were going to sell to him?

A. I told him I would pick them out of the Ellis herd that I had purchased. I had purchased a herd; I had some left; I had sold some.

I had sold ten head to Louis Voight at $1,000 apiece; I had sold four head to Rosemary Danforth at $500 apiece, and I had sold one to Elmer Koster at $1,000. I sold the four by phone before they were delivered; I sold the ten to Voight about a year before the Wick transaction (Tr. 98). Voight left his cattle with me after the purchase until just recently.

On February 9, 1952, the cattle in the Ellis herd comprised what I sold Wick and Voight. They were not separated; they were kept in the same pasture. Before I took Wick's check I went down and pointed out to him the cattle I was selling.

(Tr. 99) Q. Tell us exactly what you did in connection with that?

A. Well, he had a copy of the numbers that were—that I chose for him, and I had a copy, which we have here. By that, I mean the document marked Exhibit 2.

I went down into the pasture where the cattle were with Wick.

Q. Did you point out to him the different head of cattle that were in this list of cattle that you furnished him?

A. Corresponded to the chains.

You list cattle either by chains or tattoos. Best identification is chain (Tr. 99). The chain numbers are ⅜ inches high. The tattoos are located on the ears (Tr. 100). On our farm we list by both chain numbers and tattoo number (Tr. 100).

Mr. Wick was very satisfied with the cattle. I don't know whether he came back again in February or March. He came back after we came home from Hawaii.

When I left for Hawaii I told my herdsman to see that all of Wick's and Voight's cows were in calf. They're no good if they don't calf. I did not point out Wick's and Voight's cattle; it was all the same, so far as he was concerned (Tr. 101). We came back from Hawaii the last of May or early in June. Wick came to see me after I came home. He was accompanied either by Mary Lou O'Haran or by Pat O'Haran, her sister. They were down in the pasture with me. I pointed out the cattle to him (Tr. 102). At that time they either had calf on the ground or were in calf. The reason I did not register the cattle in Wick until July of ~~1952~~ is that they were sold guaranteed in calf and I needed that much time, and I had to wait until they conceived. It don't happen the first time always.

When Wick saw the cattle in June he expressed himself as very well pleased; his only mistake, he said, was that he didn't buy more. He came a second time before the September sale and inspected his cattle, and his particular head of cattle were pointed out to him then. The calves were at the cows' sides, then (Tr. 103).

It is true that Plaintiff's Exhibit 16, my catalog, stated "Terms and Conditions—Complete money back guarantee if not satisfied." But the words "as to breeders" should have been below it. It was announced "as to breeders" at the sale by Bill Barton, the sale manager, that way (Tr. 104).

The first time I had any indication that Wick was dissatisfied with his cattle was when I received his letter of September 24, 1952.

I did not guarantee Wick, either orally or in writing, that I would unconditionally return his money if the cat-

tle were for any reason unsatisfactory. I gave only a guarantee as I give to everyone (Tr. 104), that the cows would produce (Tr. 105). All the cattle assigned to him did produce. In September of 1952 some had produced and some were in calf.

These cows were serviced by Prince Eric 5th, GE, a bull.

(Tr. 106) I told Wick that I would take care of his cows and asked him a nominal sum. I guess we agreed around $10.00 a month, and breeding fees of $100, which was very cheap for the bull, and tend to the papers, and keep a record of his calves, which Kiki did. There was no certain time fixed as to how long we were to do this, but he was interested in buying a farm, and I was going to help him run the farm. We would put the cows on his farm if he had a farm, I imagine. He talked like he wanted me to oversee his farm for him and I was very glad to help him. We had no understanding as to when he was supposed to pay me for the keep of the cows and the servicing of them. Customarily at the end of the year, or something like that, six months, or something. We don't do it by the month. Voight did it at the end of the year. Bill Anheuser did it when he took them home.

(Tr. 107) I am not keeping cattle for anyone right now. The only ones I kept cattle for in 1952 were Wick and Voight.

We kept the certificates in August and September because we needed them so that Kiki could register the calves and have her data on that, so everything was done authentic, and that is the way it was done. When I found out that Wick no longer wished to have the cattle, that he wanted to renounce the sale (Tr. 107), I sent him the certificates (Tr. 108). If he didn't want us to run it, we had to give it to him to run (Tr. 107). This was done in September of 1952. I don't know the exact date. I first billed him for the keep and servicing after the September sale in 1952, and before December. Wick never offered to pay me for the keep of the animals, or for the service of my bull.

(Tr. 109) I did not send him the agister's lien petition. Wick never offered to retransfer these cattle to me. The cattle were finally sold by the sheriff at Montgomery. I

was not paid for the feed and servicing; Wick still owes me money.

Redirect Examination, by Mr. Baetz.

(Tr. 110) I did not say that the reason I kept the certificates and did not send them to Wick was because I had to be sure that the cows would conceive, and because if they didn't conceive I would have to substitute another cow. We kept them to carry out his offsprings, as he wished us to do. It is correct that I got the certificates from Ellis in January, 1951. It is correct that I sold the cows to Wick in February, 1952 (Tr. 111). The reason I didn't send Wick the certificates as soon as he bought the cows was that I used the certificates to get the dam and sire off of, to register the calves (Tr. 112). I had to keep them. It is true I had the pedigrees. I could have gotten the dam numbers off them. We kept the certificates because we kept all his papers. He wanted us to. He never asked—I took care of all of his papers. He asked us to keep all his papers (Tr. 114). I never told him what papers there were. The deal we made was that we would register his calves.

Q. He told you to keep all the papers? A. Agreeable.

Q. He told you—please answer my question. He told you then that you should keep all the papers with reference to that transaction? A. Why, yes, yes.

Q. He told you that?

A. Everything that corresponds to his cattle, yes.

Q. He told you that?

A. Everything that corresponded to his cattle, yes.

The period of gestation on a cow is nine months (Tr. 115). According to calves' certificates, they were dropped by eleven of the fifteen cows. The calves were dropped on the following dates in 1952:

March 8,
Mar. 14,
April 19,
May 6,
May 19,
May 20,
May 26;

June 13,
July 12,
July 12, and
July 22.

These were 11 of the 15 cows. Even though the gestation period is nine months, I wouldn't say they were pregnant with calf on February 9, 1952. You would have to have a veterinary. I wouldn't say, as a cattleman, that the cows that had calves between March and July had to be pregnant with them the previous February. I never heard of a calf being dropped three months after conception. I never heard of a cow being dropped five months after conception.

(Tr. 117). I was at the sale to satisfy the agister's lien. I couldn't say how many other cattle buyers were there. I don't know how big a crowd was there. They had a nice crowd; just farmers, that is all. There were no other cattle buyers there that I know of (Tr. 118). I don't know what each individual cow brought at the sale (Tr. 119).

Recross-Examination, by Mr. Lucas
(R. 33, Tr. 118-119).

There were six heifers among those sold to Wick. As far as I can tell from the records some cows conceived after the sale to Wick in February, 1952. I couldn't say when the remaining cows conceived (Tr. 119).

Redirect Examination, by Mr. Baetz
(R. 33, Tr. 119-122).

I do not remember which cows conceived after February 9, 1952. I bought none of the cows or calves directly or indirectly at the sale. My arrangement was for $10.00 per month for the upkeep of the cows, but you can't do it for that, Judge. You can't do it for twice or three times that. But that is what I billed him, $10.00 a month for feed and taking care of them.

R. 34, Tr. 122. The second full sentence should read:

I went to the show because I was interested in getting into, learning about, cattle as an investment.

R. 34, Tr. 123. First sentence should read:

Mary Lou O'Haran and her sister Patricia are members of that family; Mary Lou O'Haran is an employee of the organ company and her family live on a farm near Highland, where cattle are kept.

R. 34, Tr. 124, should read as follows:

Prior thereto, the Oklahoma sale was brought up and it was brought up to attend. We left Highland the later part of the day and spent the evening at Keshner's farm.

R. 34, Tr. 125, should read:

We all lodged the night there. Keshner and I did not have any conversation then about my investing money with him. On the trip to Oklahoma in the car I naturally asked a great many questions of him about what was involved in the cattle business, upkeep and maintenance.

R. 34, insert as first sentence of Tr. 127:

They (Keshner and Mary Lou O'Haran) were talking about pedigree, but that was completely foreign to me.

R 35. The sentence commencing immediately before (Tr. 129) should read:

I explained to him that in the pipe organ business there are times when I need the financial backing to help meet payrolls.

R. 35. In lieu of the first four lines of the last paragraph, as printed (Tr. 133), the same should read as follows:

I did not give Keshner the $15,000 then, but went on to Highland. I do not remember any further conversations until February 9, 1952. I next saw him on February 9, 1952.

(Tr. 132) A. Well, the conversation consisted of, again, confirming what I mentioned.

Q. Don't give conclusions; you must state what was said the best you can.

A. He indicated I would be purchasing fifteen bred heifers, and again stating, of course, that the maintenance on them would be on the basis of $200 per head per year, which included breeding.

R. 36, Tr. 134. Insert at the top of the page, after the word "mine," the following, and strike out from said record the words, "I couldn't see all of them":

I could tell which had double neck chains, which did not. It wasn't possible to see the appearance of each one of the double neck chain cows.

R. 36, Tr. 136. In lieu of what appears in appellant's record, insert:

Clint Holloman, Keshner's man who was taking care of his cattle, was there. He didn't point them out to me; he said he didn't know which cattle that were mine, that there was a herd of cattle in a certain field, and there were double neck chain animals in there and also animals owned by a man by the name of Mr. Voight in the same field, so that was the extent of our conversation. So I just left them. I was coming back from Kansas City and stopped there.

R. 36. Strike Tr. 137 as printed, and insert in lieu thereof:

(Tr. 137) Keshner got back from Honolulu in June, and I then called at the Good Earth Farm. I didn't ask Keshner at that time to see my cattle because, first of all, I had a young lady with me from Kansas City, and we just took a flight out to his farm, and he was sick in bed, and so he said, "Your cattle are over in a certain pasture with Voight's," but we just walked around the farm. It was an afternoon of leisure, so to speak, but I never saw any particular cattle.

R. 36. Tr. 140. The first sentence should read:

Shortly thereafter I heard my name announced as having bid on two additional animals, and since I hadn't bid, it was only then that I began to worry about the money I had paid out to him, and in talking with people after the sale there, it was specified that he probably used my name for buy bidding.

R. 37. Adding to Tr. 142, and substituting for the first line of Tr. 143, the following:

Q. Did Mr. Keshner, on February 9, 1952, or prior thereto, make any statements to you definitely as to the value of the animals which would be allotted to you for $15,000?

Mr. Lucas: Same objection, your Honor, as previously; representation as to value is not pertinent in the matter——

The Court: Be sustained. I think you have already been over that conversation.

Mr. Lucas: I objected before to it.

The Court: He's supposed to have told you what they said.

Mr. Baetz: I'm a little foggy-minded, your Honor.

The Court: Be overruled. I will let him answer. Let's get along. It is purely repetitious, but it looks like that is the only way I can satisfy you people. It's before the court. Read him the question.

(Whereupon, the reporter read the question.)

A. He said that they would be of the same value as the cattle that he would be——

The Court: He said he was going to give him 30,000 for fifteen, that's what he testified to before.

Mr. Baetz: Your Honor recalls that; I'm sorry, sir.

Q. (By Mr. Baetz) "The same value as that," one thousand or two thousand dollars, give me figures, if he used them. A. $2,000.

The Court: He told him he was going to give him a two thousand dollar cow for a thousand dollars; that's what he testified to earlier.

## Cross-Examination of Martin W. Wick
## (R. 37-44, Tr. 148-196).

R. 37, and R. 38. In lieu of Tr. 149, as there printed, the following:

I didn't know what to expect in the cattle business. I knew that each animal had a pedigree.

Q. Did you know that each registered animal had a registration paper?

A. I knew that each one had a pedigree, but as far as what I was supposed to get, I wouldn't know.

Q. Now, I believe you said Miss Mary Lou O'Haran, in your original testimony, knew about cattle, and—knew something about cattle and talked to you about the cattle, is that correct? A. Yes.

Q. Did you know that she had bought two cattle from Mr. Keshner sometime prior to this time for a thousand dollars each?

A. I knew that she had bought some cattle, but as to their value, I wouldn't know that.

R. 38. Tr. 151, first sentence to read:

I wanted to purchase the cattle then, purely to go into the business of raising pure-bred Angus cattle as an investment.

Because of the numerous omissions in the cross-examination of plaintiff, as reflected by the fourth paragraph on R. 38, we print here said paragraph in its entirety, including the omitted portions (Tr. 152-155):

Miss O'Haran, Keshner and I made the trip to Tulsa and Miami, Okla. We talked about purchasing an animal on the trip (Tr. 152). I don't remember whether cattle was selling high after the Miami sale. At the sale, Mr. Keshner said, "This is a good animal; how about taking a third interest in it?" I said, "Well, if you say it's a good animal" (Tr. 154). Miss O'Haran was to take a third interest, also. Then it was agreed at that time, and Miss O'Haran, who had handled Angus catttle for sometime, we three agreed to purchase this animal, each taking a third interest. I paid $1,000; the animal cost $3,000 (Tr. 155). I wrote the check for the $1,000 the same time I wrote the $15,000 check. The animal we bought there was not the first one through the ring. I had seen the sale at Miami the day before, and I had seen them sell at the Chicago sale. So then I made the determination, along with Miss O'Haran and Mr. Keshner, to buy the $3,000 animal and pay $1,000 for a third.

R. 39. Tr. 158. The third paragraph, first sentence, should read:

From where I was I could see the chains on the cows, but not the numbers.

R. 39. The last three sentences of paragraph 4, comprising part of Tr. 160-161, should be omitted, and the following substituted in their stead:

Q. Do you remember the conversation that she said she couldn't write Hartford Insurance on this herd because there was only fifteen of them, that Hartford would only insure fifteen as a group herd at three per cent, or six per cent, or whatever it was, and she told you that they wouldn't insure them unless they were eight years or younger. Do you remember any of that conversation?

A. No, I really don't remember that.

Q. It could have taken place, though?

A. It could have taken place, I suppose; I don't remember.

R. 39. Tr. 164. The last sentence should read:

Later I flew an airplane in. There was a young lady from Kansas City with me. We walked around the farm.

R. 40. Tr. 166. The first sentence, second paragraph, should read:

Keshner was sick at the time, and I didn't ask him to go down and point out my cattle to me, or send someone with me.

Because of the many material omissions in the cross-examination of plaintiff contained in the third paragraph on R. 40, we reprint the same here:

Both the O'Haran girls and I drove down one Sunday during the summer months. It was very hot. I am not familiar with droughts in that area (Tr. 167). I don't remember if it was dry in 1952 (Tr. 168).

Q. I will ask you this: Did you ever go down in the pasture and look at the cattle at any time during that summer?

A. No, as far as looking at my particular cattle, no.

Q. You never did go down and look at them? A. No.
Q. You're sure about that? A. That's correct.

* * * * * * * *

Q. You showed great interest in March or April about these cattle, and you wrote clear to Hawaii about it, didn't you? A. That's true.

Q. You had all summer to go out there and see those cattle and you tell the court you didn't go down into the pasture and look at it?

A. What I'm trying to get across, the point——

Q. Just answer the question.

A. I didn't go out and pick out any cattle. I walked around the farm on the occasion of each visit.

(Tr. 169) At one time Keshner was trying to arrange to see this farm of Hensley's, or something like that, but I told him it was impossible for me to spend any money like that (Tr. 170). I don't believe anyone other than the Misses O'Haran and the young lady from Kansas City ever accompanied me to the Keshner farm.

Q. Can you explain to me and the court why your great concern, along in February or March, and no concern looking at the cattle, if you didn't look at them, all summer long, up until September 24th or 22nd?

A. Well, actually what happened, after the—attending these sales, I mean I had such a complete interest in hearing from Mr. Keshner as to what's happening, I mean as he picked (Tr. 171) out my animals, and so forth, that, naturally, I was interested in learning something about it, plus the fact that I was coming back from Kansas City and wanted to stop in in any event and see the cattle.

Q. But you are certain that you didn't go down in the pasture and look at your particular cattle?

A. Not picked out, in other words. If they were my cattle, they were in with a herd.

Q. Pardon me? A. They were in with a herd, I'd say.

Q. In with the Voight cattle?

A. I suppose that is what they were.

Q. Did you ever go down in the pasture and look at these cattle with any other men, for example, other than Mr. Keshner? A. I don't recall.

Q. Maybe I can refresh your memory, Mr. Wick. Don't you recall the time you came in to Mr. Keshner, when Mr.

Waples was there, and you and Mr. Waples and Joe went down in the pasture and looked at these cattle and they were pointed out to you, and you commented on how well you liked them, and so forth, do you remember that?

A. I do not remember that.

Q. But you remember all about the trip back in March and April?

A. Yes, I remember those because they happened.

(Tr. 172) Q. You don't have any other idea of these other trips—if it was made? A. I don't recall.

Q. Could it have happened?

A. I don't even know Mr. Waples.

Q. I expect that is right, but you didn't go down in the pasture with him to look at these cattle. You couldn't if you didn't go down and look at them at all, could you?

A. That's right, I don't remember.

Q. And you are as sure of that as you are as sure of everything else you have testified to, I presume?

A. I'm sure of what I have told you to be the truth.

R. 40, Tr. 173, should read:

Although there were many people who wanted to see the cattle they bought at the sale, I wanted Keshner to pick out my cattle, show them to me one at a time. I had a good reason to be exercised about my cattle after the sale.

R. 40, paragraph 6, instead of the first line and one-half, it should read as follows:

I saw the cattle that day. I recognized them by the double neck chains. I was able to find them after Keshner told me where they were (Tr. 174).

Beginning with the last paragraph on page 40, to the end of the first paragraph on page 41 of the cross-examination of plaintiff, this should read as follows:

When I saw the cattle in the pasture there were calves running all over the place. I suppose that if the cows had been nursing the calves all summer long on a dry, droughty condition, they wouldn't be fat as animals going through the ring. I don't know if the keep I was to pay was supposed to keep them in sale condition. I didn't think it would so keep them. I didn't know what their ages were (Tr. 178). I attended a sale at Columbia before Keshner's

September sale and bought three cows and a calf. After the September Sale at Good Earth, I went to the Ralph Smith farm, where I purchased an animal for $1,500 (Tr. 179). Then I went to the Kansas City sale. Miss O'Haran and other cattle people were with me on the trip. She advised and recommended the sale. I didn't buy any at Kansas City; I didn't have any money left.

R. 41. The last sentence of Tr. 185 should read:

I received a copy of the petition that was filed and a letter from the Judge that the cattle was going to be sold.

R. 41. Tr. 187 should read as follows:

Q. Didn't he call you and tell you, or Mrs. Keshner, that he had a buyer for all of your calves, that crop of calves, that would be in December, 1952, that he would take all those calves at around 250 or $300, and you told him you wouldn't sell them that cheap?

A. No, I don't remember.

Q. Did you ever receive a letter to the effect that he had a buyer for all your calves?

(Tr. 188) A. All I remember is that he wrote in a letter this, I remember that, that I had to take the cattle off his property because he had—he was buying some other cattle.

Q. I hand you a copy of a letter dated December 13, 1952, addressed to you, and ask you if you ever received the original of that letter, Mr. Wick?

A. Yes, I remember that.

R. 43. In lieu of Tr. 190 to 192, the following:

Q. Now, knowing all the time that you had the registration papers of those very calves in your possession, where they had been transferred to you, is that right?

A. Knowing again what, sir?

Q. That you had the registration certificates of the very same calves already transferred to you, at least eleven of them. Right?

A. I had—my attorney had the registration certificates.

Q. Well, but you gave them to him; you had them prior to that and you could have gotten them, couldn't you?

A. Yes, I could have gotten them.

Q. Now, knowing that you have to sign those transfers—

A. When you say "now, knowing," yes, that's right, I know it now.

Q. You never offered to transfer those cattle back to him, did you?

A. Like you say, "now knowing." I mean I didn't know at that time what was supposed to have been done. This is—I mean apparently Mr. Richards cleared up a lot of things today that I didn't know about.

Q. But you knew Miss O'Haran knew, didn't you?

A. Yes, but——.

Q. And she is an employee of yours, isn't she?

(Tr. 191) A. Yes.

Q. You could have found out by merely asking her, couldn't you? A. That's true, I could have.

Q. But you elected not to ask anybody and to keep the certificates?

A. There was never any request made for those certificates—to my knowledge, I mean.

Q. You mean to tell this court that these certificates have never been requested of you before this date?

A. To be returned by Joe Keshner?

Q. Yes.

A. You mean Joe Keshner requested that they be returned? I don't remember that. He would be the natural person to ask for them if he's supposed to get them back. I recall of receiving no letter to that effect.

Q. After these cattle were sold, weren't there numerous requests to try to get the title of these?

A. To get the certificates back?

Q. Yes. A. I don't know of any.

Q. At the time the sheriff sold them, I'm sorry.

A. You mean that he specifically asked for these certificates to be returned?

Q. Yes. Look at me; don't look at Mr. Baetz.

(Tr. 192) Mr. Baetz: May I state this? At your request, your Angus Association wrote me——

Mr. Spencer: Now, Mr. Baetz——

The Court: Let's don't get into that. Let him answer the question, if he doesn't know, let him say he doesn't know.

Mr. Baetz: He doesn't know.

Mr. Spencer: Now, Mr. Baetz——

The Witness: I don't know.

The Court: You don't know?

The Witness: No.

I sent the letter, which was marked Defendant's Exhibit D, to Mr. Costello.——

R. 44. Paragraph 2 should read as follows:

On February 9 we saw the cattle in the pasture; that is correct (Tr. 193). At no time were any cattle ever picked out as you would normally do, and Keshner did not say, "Now, this is your cow," or "This is your heifer," or "This is the pedigree of the cattle." I never did ask to have each cow with a double neckchain identified by pedigree.

R. 44, Tr. 196. The last sentence should read:

But I did not count each one because they kept shifting around by the time I would look at one. I didn't show enough interest to even count to see how many there were, and because there were other cattle in there.

R. 45, Tr. 203 should read:

There was a drought in 1952, 1953 and 1954; it was dry all three years.

R. 47, Tr. 208. The first statement by the Court should read:

The Court: Overruled. It is a matter before the Court. I will permit him to answer for what it may be worth.

R. 48, Tr. 212 should read:

## ORVILLE HELMS.

Cross-Examination (R. 48, Tr. 212-223).

By Mr. Spencer:

I saw the tabulated pedigrees a few days ago. I never saw the registration certificates until today. I may or may not have seen the individual animals. They have never been identified to me. The particular animal has never been identified with the particular pedigree. I made the determination of values from three factors: pedigree, individual and age.

R. 48. The second paragraph, comprising cross-examination of witness Helms, should read as follows:

The cow represented by Exhibit 13-A was calved in 1939; she was 13 years old in 1952. 13-M was 11 years old in 1952; she was calved in 1941 (Tr. 218). The 11-year-old cow is $100 cheaper than the 13-year-old one (Tr. 218). Pedigree is also a factor, and there are also other factors. I do not know what per cent I gave age in making the evaluation (Tr. 219). I do not know what bull these cows were bred to, but I heard testimony which mentioned a bull named Prince Eric of Good Earth 5th (R. 220). I did not know whether they were in calf at the time they were sold.

Q. Do you know whether all of these cows were in calf at the time they were sold? A. No.

Q. Would it make any difference if you did know?

A. Well, as a breeder, I would assume they were, that age cows, or either had a calf at their side.

The Court: Trouble with you cow men, you assume too much. They ask you a question and you give an answer to it, and then you come up with a lot of assumptions. You're supposed to listen to the question and answer it as it is directed to you.

Q. (By Mr. Spencer) Now, as I understand, Mr. Helms, in putting the value on these cows, you did not take into consideration the bull they were bred to from your own personal knowledge? You have never seen the cattle of your own personal knowledge? The conditions of the sale,

who sold them, how they were advertised, the difference in quality, in making this determination, is that correct?

A. No, I didn't. I based my value on the tabulation pedigrees, valuation.

Mr. Spencer: I believe that is all (Tr. 222).

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Direct Examination of CURTIS EASTWOOD (R. 48-49, 223-226).

Testimony of Curtis Eastwood, R. 49, first sentence of the second paragraph should read:

I saw the herd of cattle once that were owned by J. P. Ellis and were sold by him to Joseph Keshner in January of 1951, on the Ellis property.

R. 49. The use of the word "allotted" in the note at the bottom of the page is not based upon testimony of the witness, but is what Mr. Baetz contends.

Cross-Examination of Witness Eastwood.

R. 50. Tr. 233 to beginning of 236 should read:

I got $200 for two Blackcap Empress heifers in 1954, when it was dry. One of these was by the same bull for which I got $2,600 in 1951. Blackcap Empress have been a popular cattle. Blackcap Revolution probably started the ball rolling. Blackcap Empress was an International Grand Champion (Tr. 234). When you get a grand champion in the family it seems to boost up the price. Black Jestress are fourth branch Blackbird. Ralph Smith or someone had one that was a grand champion, that's right. They are very desirable to own (Tr. 236). If you can get ahold of one you can afford to pay.

R. 50. Tr. 237 should read:

Assuming that Frank Richards did say that the grand champion in 1952 was from the same family as these Lady Jeans, maybe it should affect their value as the Blackcap Empress should, but I haven't heard of anyone hunting them. The heifers Elbert Jones bought for $200 weren't the heifer the $2600 heifer was.

When testifying I did not have in mind the various respective individuals of this Ellis herd. We saw the Ellis cows in 1951; we didn't have a tabulation. I think that selling prices have something to do with values, yes.

The first paragraph, as printed in R. 51, of Tr. 239, should read:

I don't know Mr. Koster. If he bought one of this herd for $1,000 in 1951 and sold it the next year for $1,200 at private sale this wouldn't affect me on this tribe of cattle.

Preceding the last sentence of what appears to be Tr. 239, R. 51, there should be inserted:

These 1950 calves that I saw down at Ellis' farm were very nice heifers. If the animals are calves in 1950, they could calf in 1952.

R. 51, Tr. 242, should read:

I know nothing of degree of pregnancy. It makes a difference what bull a cow is bred to regardless of the female. It is possible, in some cases, that the same cow, with the same pedigree, would sell higher or lower, depending on who is selling her, yes. I have heard of cases where a cow might sell for maybe $2,000 in less than a year's time for two or three times the original selling price. The reason is that the owner probably bred the cow to a $50,000 or $60,000 bull.

R. 51. Insert in lieu of the first sentence of Tr. 243, the following:

That had something to do with it.

Q. They don't always sell at the same price in successive sales, same breeding, same type of bull or anything else, do they?

A. Oh, there's some herds advertised more than others.

R. 51, Tr. 244. The date at the end of the first line should be 1953, not 1943.

R. 51. Tr. 246. Instead of the last sentence, insert:

Q. So we cannot limit it to an individual 50 per cent and tabulation 50 per cent, can we?

A. Well, you would have to consider the cow, the bull, kind of bull a cow was bred to, but when I say 50-50, if you went out and bought open heifers and calves—that's what I had in mind.

Q. Now, wait a minute, Curtis. You had in mind, according to the counsel's question, that you assumed that they were in calf.

A. I still stick to 50-50 when I go to buy a female.

Q. 50 per cent individual, 50 per cent tabulation?

A. I would.

---

Direct Examination of R. EMMETT COSTELLO (R. 52, Tr. 247-252).

R. 52, Tr. 248. Add to first sentence, so that same reads:

On December 24, 1952, I wrote Mr. Wick about a demand of Mr. Keshner against him for a feed bill, and also to take from Mr. Keshner's farm the cattle that I understood was sold by Mr. Keshner to Mr. Wick.

R. 52. The last sentence preceding Tr. 251, as printed, should read:

I was anxious for Wick to take over the cattle (Tr. 251), that I understood he had bought and paid the feed bill, that he might owe for the time the cattle had been in Mr. Keshner's possession through an understanding that I understood he had with Mr. Wick.

---

Direct Examination of MARY O'HARAN (R. 53, Tr. 253-266).

R. 53. Tr. 260, should read:

He said the cow drops a coupon once a year, and you can't lose if the good Lord don't call them home. Those are the only statements that stuck with me.

I next accompanied Mr. Wick to the Good Earth Farm on February 9th.

R. 54. Tr. 264, should read:

We just walked in the pasture; there were about 25 or 30 cows in there. Keshner said that the cows allotted to Wick were wearing double neck chains. Mr. Keshner said that some of Mr. Wick's had double neck chains, but we couldn't tell his double neck chained cattle from the other double neck chained cattle.

R. 54. The last sentence of Tr. 265 should read:

I had asked for time off to go to a Texas sale, and we got to talking, and he said he would like to invest in cattle and wanted to know if I knew anything about it; and after we came back we talked about it.

Cross-Examination of MARY O'HARAN
(R. 54-56, Tr. 266-278).

R. 54. The last sentence of Tr. 268 should read:

Mr. Wick's cattle belong to two families, Pride of Aberdeen and Erica. In February, we walked into the lot but didn't get too close to the cattle.

R. 54. Tr. 271, should read:

That is what the transfer said. If Prince Eric GE 5th bred the cows, he would have to be with them sometime or other. Mr. Keshner said the bull with the cows was Prince Eric 30th something.

R. 55, Tr. 275, should read:

It is possible and possibly something was said how the cows looked. I didn't say anything. I have attended a lot of sales. I have never heard a supposed buyer deny that he made a bid.

R. 55. Tr. 276 should read:

On February 9, 1952, I went with Mr. Wick to the pasture where 25 or 30 cattle were. Some of them had double neck chains. Mr. Keshner said the double neck chained cattle were the ones Wick was interested in, and Mr. Wick so stated. They both stated that the ones with double neck chains were Mr. Wick's cattle.

---

R. 55. PATRICIA O'HARAN, Direct Examination, Tr. 278:

I am employed at Wick's organ company.

R. 55, Tr. 279. Add after the sentence, "I have been to several sales and the International," the following:—

I learned about Angus cattle since I was 19

R. 55. Tr. 280, should read:

Mr. Wick, Mary and I went to look at some cattle in the pasture. Some were as far as from the witness stand to the front of the court room. The cattle were all around, not very close; there were two fields with a fence between; the cattle were in one field and we were in the other, I think. It seemed to me like a big herd, 30 or something.

R. 55. Tr. 281 should read:

Q. Did you hear any statements by Mr. Keshner with reference to the identity of those cattle as being chosen for Mr. Wick?

A. I mean I didn't know what they were doing at the time. I was just out there. But he did say something about the double neck chains.

Q. Keshner did?

A. Yes, and he said that some of the ones that had double neck chains were Mr. Voight's.

Q. Were Mr. Voight's? A. Yes.

I didn't have any reason to count the animals.

Mary, Martin and I also went to the farm in the summer of 1952, and while there we looked at cattle.

R. 56, Tr. 283 should read:

I was also there at the 1952 sale. I can remember Martin then asked Joe where the cattle were, and Mr. Fairchild and Betsy Voight and Mary, Martin and I drove out into the field, looked to me like the same cows. I mean they had double neck chains on. Of course, I don't know, and we saw those cows. There were approximately 30 plus the calves.

Cross-Examination of PATRICIA O'HARAN
(R. 56-57, Tr. 284-294).

R. 56, Tr. 284, should read:

When I went out in September of 1952, the cattle I saw in the particular field looked like the same cows I had seen back in February, except that there were some more calves. I guess the cows looked thinner then than in February, but they were just cattle. It was dry, but I don't know what the degree of drought was. They had double neck chains.

The first line of the fourth paragraph, R. 56, Tr. 287, should read:

There were double neck chains and single neck chains, and the ones with double neck chains were supposed to be Mr. Wick's.

R. 56, the first sentence of Tr. 290, should read:

Mr. Keshner and Mr. Wick went in the field to look at this group of cattle.

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Defendant's Evidence.

Direct examination of FRANK RICHARDS (R. 59, Tr. 33).

R. 59. The first two sentences from Tr. 36 should read:

Quite often sales are made before transfers are effected with the association. Under the rules a transfer within 30 days has a certain fee, a transfer 30 to 60 days has another fee, and over 60 days the fee varies. And on the application for transfer there is a sale date and a delivery date and very often those are different dates. As between the parties themselves, we are not advised of the exact date of sale (Tr. 36).

R. 59, Tr. 37. In lieu of the last two sentences, insert:

I think drought conditions throughout the country are primarily responsible for less demand. We have found in sales that have been held in the last two years that a majority of the cattle have been open heifers, that is, heifers that have not been bred. Therefore, the cattle have been selling younger, and possibly not in as good a condition as they were sold prior to drought years.

Aberdeen-Angus cows have produced calves when aged up to 20 years and older, but that is an exception.

R. 60, Tr. 38. In lieu of the recital beginning with the first sentence in the first paragraph at the top of page R. 60 insert:

I am familiar with the Lady Jean and Trojan Erica family. A female called Lady Banmere was traced to

the same foundation as the Lady Jean tribe, and made the Grand Championship at the International Live Stock Exposition in Chicago.

Cross-Examination of Witness RICHARDS
(R. 60, Tr. 39-55).

R. 60, Tr. 42. In cross-examination, insert in lieu of the last two sentences in paragraph 5, Tr. 42, the following:

Q. We start him off on your records. Where on those blanks is a space for Keshner or anyone else to tell the date between date of sale or date of delivery or anything else?

A. Not on this; the sale is on a separate sheet of paper, a pink sheet, that is an application for transfer.

Q. I see. Now, when you get a retroactive or post-dated certificate, or I don't know the terminology of your Association, what I mean is when you get a transfer or an original entry that reflects something done previously, is there any indication of that fact other than the dates which are filled in on the usual blanks in the certificates?

A. There's nothing like that.

R. 60, Tr. 43. Insert before the last sentence:

The name should appear on a family tree.

R. 61: Insert in lieu of what appears to be the last two sentences of Tr. 46, actually Tr. 47, the following:

I know that that bull was sired by a bull called, I think it was Prince Erica 2d of Sunbeam. Prince Erica 2d of Sunbeam was sired by a bull called Prince Erica of Sunbeam, which became a very important bull in our breed of cattle, sold in the early forties for $40,000 at a sale in Chicago, later sold in a Ralph Smith dispersion at Lonejack, Missouri, for the sum of $36,000 to Mr. L. L. O'Brian, Mukwonago, Wisconsin, and was later sold by Mr. O'Brian to Shadow Isle Farm in New Jersey for a hundred thousand dollars.

Q. This is an ancestor——

A. This is a full brother to the sire of the bull that you mentioned here.

I know Mr. Keshner has used the full brother of the bull that I have described and has used some of that bull as herd bulls in his herd.

---

R. 63, GLEN WAPLES—Direct Examination—Tr. 302 and 303 should read:

(Tr. 302) I think Patricia O'Haran went along. My son was there also. We went to a pasture north of the house. The occasion of our going out there was that I just heard them talking about going out to look at Mr. Wick's cattle. They invited me to go along. The cattle were in the pasture. Wick accompanied us into the pasture; so did Keshner. (Tr. 303) There were 25 or 30 cattle there.

In response to a question as to whether anything was said by Keshner to Wick with reference to which was his cattle in that particular group, Waples stated that Keshner walked by certain individuals and pointed them out and talked about them, "those being the ones, as I understood it." There were 8 or 10 pointed out to him—might have been more.

R. 63. The first sentence of Tr. 306 should read:

I suppose it was in the late fall of 1951.

R. 63. Tr. 307. Cross-examination, the first sentence should read:

The cows I was going to buy at $1,000 a head were the cows he later sold to Mr. Voight; I believe (Tr. 307).

R. 64. Tr. 311 should read:

But I think they were. Some of them could be the ones later purportedly sold to Wick. I don't know whether all of them have now disappeared from Keshner's herds. I don't know anything about them.

R. 64. Tr. 312, should read:

All of them were practically the same breeding, the same families. The individuals run about the same if——

As a cattle expert, I would say that every animal in the Ellis herd was just about the same value as far as families were concerned, but I wouldn't say that exactly about the

individuals. If we had gone through the deal, we would have picked out what we considered ten better individuals.

R. 64, Tr. 313, first sentence should read:

I don't know if Keshner would have permitted me to pick out the best ten.

R. 64, Tr. 314 should read:

As I say, the cattle all looked about alike and their families were the same. Yes, they looked alike; they were all worth about the same per head. The families were all similar and the individuality was a good deal alike. I will say that in my opinion as a cattleman, each and every animal in that Ellis herd was worth about the same. And since there were 33 animals, I would say that the Ellis herd at that time was worth $33,000.

---

KATHERINE KESHNER, Direct Examination (R. 65, Tr. 318):

R. 65. Preceding recital of Tr. 319, insert:

I have two children.

R. 65, Tr. 321. The first two sentences should read:

I prepared a statement of the transaction. Plaintiff's Exhibit 2 is a copy of it, made simultaneously with the original.

R. 65, Tr. 322. In lieu of the first sentence, the first quotation of the conversation between Wick and Keshner in the first sentence of the last paragraph of R. 65 should read:

The original was signed by Mr. Keshner and Mr. Wick and given to Mr. Wick. Martin asked Joe, "We'll sign your copy, too?" Joe said, "That isn't necessary; I have your check in payment."

There was a discussion about the ages of the cattle which were being sold by this statement.

R. 66. Tr. 323-324 should read:

When Mr. Wick purchased these cattle they were purchased with a guarantee that they were bred cows. The

ones that had not conceived, to conceive. It was decided we should wait as to the insurance.

R. 66. Tr. 327, the first sentence should read:

After my return I saw Mr. Wick at the farm when he flew in in his private plane.

R. 66. Tr. 328, 329 and 330, and that part of Tr. 331 and 332 as appears in all but the last paragraph of R. 66, should read:

The next occasion was in July, when he came with Mary Lou O'Haran and possibly Patricia. They went to look at the cattle in company with Mr. Keshner. I did not go with them. They discussed how the cattle looked good (Tr. 329). Mr. Wick was pleased with his cattle. The next time was when he flew in with a lady from Kansas City. Mr. Keshner was sick at that time, and I went over and got them at the airport. He went to look at his cattle. He said that his cattle looked fine (Tr. 33). The next time he came in with Mary Lou O'Haran and Patricia. Mr. and Mrs. Waples were at the farm. Mr. Wick went and looked at his cattle. Mr. Keshner, Mr. Wick, Patricia, Mr. Waples and Mr. Waples' son went out to look at his cattle. I did not go. He said that his cattle looked very good and the calves looked very promising. The next occasion was at our annual sale in September. He came into the house that morning (Tr. 331). He made no inquiry as to his cattle to me. We had a party at the farm after the sale, and he was there. He did not discuss his cattle in my presence. He did not say on that day that he was dissatisfied with his cattle.

I next saw him at the Ralph Smith sale after our sale (Tr. 332). He made no statement to me or anyone else there about his cattle. I don't remember if I saw him again.

R. 67, Tr. 333. At the end of top or first paragraph, add:

The rest we sold.

## Cross-Examination KATHARINE KESHNER (R. 67, Tr. 334).

R. 67—Cross-Examination. In lieu of Tr. 336 and 338, insert:

A. You're asking me to read from my bookkeeping books, the way my books are set up on the Ellis herd, in the year when they were acquired?

Q. Yes, ma'am.

A. I have a tax account, and when we purchase cattle, we purchased the Ellis herd, I show that in my books as the Ellis herd purchased for the sum that we purchased. However, during the course of that year, when we sold cattle in that year, my books merely indicate that I sold so many head from the Ellis herd, and until the end of the year, when my books are taken into consideration for tax purposes, we only had a certain number of the Ellis herd left on our farm during that first year. You recall, I told you some cattle were sold. I did not have to have a list of those cattle. Only at the end of the year are my books—the remaining Ellis herd is in my books.

Q. Well, can you tell me this, and I thought you answered the court, but I may have misunderstood you, when you acquired the Ellis herd, did you set down on your books a value for each one of the animals?

A. I set in my books the purchase. I show the purchase of the Ellis cattle for a certain fee. That is what is set up in my books.

Q. Did you break it down into individual animals?

A. Not when the cattle were purchased.

At the end of the year they are broken down.

R. 67. The first sentence of paragraph 4, Tr. 341, should read:

We charged ourselves $11,000 for the herd;

R. 68, paragraphs 2 and 3, Tr. 345-346, should read:

The Voight cattle were left on the farm until the fall of 1954. They were on the farm for a couple of years at least. The calves sold around $250 to $300 each. Some higher (Tr. 346). I don't recall of any selling for less.

The cost of keeping, feeding and maintaining a cow is about $120 to $175 per year; in that general neighborhood. Unless I saw the figures I wouldn't know.

R. 71, second paragraph, first sentence, Tr. 355, should read:

The entry of Prince Eric 5th on Exhibits 5-A to 5-K, the calf certificates, is off the stubs sent in to the Association.

R. 71. Add to the last sentence of paragraph 3, Tr. 357:

There are occasions when we will sell a cow that we have purchased.

Last paragraph of R. 71 should read:

Any breeder is proud of his sale average; I don't mean us in particular, any breeder is. Sales average is not everything. It's the cattle; we're proud of the cattle. Sale average, of course, goes with the cattle. We're proud of who they go to.

R. 72. Tr. 359. Top of page, first sentence should read:

Page 32 of the Aberdeen-Angus Journal shown me is our advertisement for the Good Earth sale in 1952.

---

Direct Examination of GEORGE E. COOPER.

R. 72, Tr. 360, the last sentence of the first paragraph should read:

I have judged cattle, I think, in every State of the Union and in Canada at least four times; Angus as well as Jerseys, too, Holsteins, Shorthorns, all kinds.

R. 72, Tr. 364, should read:

I will guarantee that it isn't possible to base the value of an animal on pedigree alone without a careful examination of the individual animal. There isn't anybody can do it: You have to look at the animals pretty good, quite close. You would have to be better than I am to just pass by them.

We bought the Bar X herd in November of 1953. There were 70 head. When a calf is nursing her mother we in-

clude that one and the calf is not counted as an individual. We paid an average of $400 a head for them. We have sold 20 of them at an average of right near $1,700, and the best of them (Tr. 365). We took out probably the best six and put in my topper. They varied from calves not already weaned up to cows 14 and 15 years old.

It is not unusual in the cattle business to make a profit of that kind when you buy a herd. It's done every day.

R. 73. Tr. 367, should read:

An announcement was made prior to the sale by Bill Barton, at the auction block, that the money-back guarantee was effective on cows that would not breed. They were guaranteed to be breeders. That is typical; that is customary.

We sold a set of twin calves recently, within the last 30 days, for $3,500.

Cross-Examination of GEORGE E. COOPER
(R. 73, Tr. 367):

R. 73. In lieu of Tr. 368 to 371, insert:

Q. Wouldn't you say this is so, Mr. Cooper, that if I showed you a pedigree in a certain case you could say whatever the condition of that animal is, no matter how good she is, she couldn't be worth more than thus and so, isn't that true?

A. No, I don't think that is true, because in the last two years, I have paid more money for cattle, cows, than I ever thought I would pay five years ago. I don't think anybody can tell how much a cow was worth today by just looking at her, or studying her pedigree alone. You got to look at her as well.

Q. You then, as I understand it, if I would hand you a certain pedigree, you wouldn't say this cow couldn't be worth more than four or $500, no matter what its shape, because its pedigree wouldn't justify it? You couldn't even go that far? You would have to see the beast, is that right?

A. You're asking me to do something I don't know.

Q. I realize, I'm not asking——

A. You're picking out a fictitious case and I don't think that should be.

Q. You don't think that should be done?

A. No, I don't think that is right. I paid $31,500 for a cow and calf, within the last two years.

(Tr. 369) Q. Just for example, look at Plaintiff's Exhibit 13-A, an animal born in 1939, has endorsed at the top the family name, Enchantress Trojan Erica. Just look at that pedigree, sir, and say whether that looks like one of these pedigrees that would authorize or justify a high price? A. This is a pretty good pedigree.

Q. What family, sir?

A. You have Enchantress—you're asking me to analyze pedigrees. That is about what you are asking me to do.

Q. My question was this, and you may supplement it if you have any information there, my question is, look at that and see if that justifies a thousand dollars a cow?

A. You want me to tell you why?

Q. First, does it in your opinion? A. Yes.

Q. Then tell me why.

A. You have Eileenmere 32", International Grand Champion bull, Eileenmere 15", International Grand Champion bull, Earl Marshall, a bull that's sired six International Grand Champions; Earl Marshall again, Bertram's Earl, another bull that's well known (Tr. 370); Bertram Earl again, and those are all top bulls in the Angus breed today.

Q. What family does that particular——

A. Enchantress Trojan Erica.

Q. Do you have any of those animals in your herd?

A. Lots of them.

Q. Lots of them. Now, look down here, sir, to another one, the next one in the list, that is Plaintiff's Exhibit 13-M, but because there are two 13-M's, by reason of error, I will give the name of the animal, Imogene Adelia the 41st. That is the short paper up here. Do you think that that pedigree warrants a thousand dollar cow?

A. It could be, and it could not be. I can't tell you. The pedigree could have a thousand dollar cow with it just as well as not, yes.

Q. Could have. That one there, too, what family is that? A. Lady Jean.

Q. That is not J-á-n-e, but J-e-a-n?

A. That's right, I misspoke it, Lady Jean.

Q. How many of those animals just roughly, do you embrace within your herds out here?

A. I don't happen to have any Lady Jeans.

Q. And, as a matter of fact, you don't know anybody that is very proud about the Lady Jeans?

A. Well, if I'm not mistaken, there's an International (Tr. 370-371) Grand Champion that's a Lady Jean.

Q. Maybe you are mistaken. Could you tell what the name of that animal is?

A. Heifer Tolen showed two years ago.

Q. Have you ever had any——

A. Grand Champion in 1952.

Q. Have you ever had any of the Lady Jean in your herds? A. No, I haven't.

Q. Any of them ever been offered to you? A. No.

Q. Just never came across them?

A. Not to my knowledge.

Q. Would you turn them down if they were?

A. Not if they are good.

Q. And not if they are young, is that right, sir?

A. That is indefinite; what do you mean, "young"?

Q. What does a cowman, cattleman, I should say, let me ask you this, you seem to know a great deal about it: What is the average life span of a cow, this breed?

A. Oh, we figure around 14 to 15 years.

R. 74. Tr. 372, should read:

She starts producing as a two-year old and she usually produces until you dispose of her. I couldn't call an 11-year old a young cow; she's getting to be an old cow. I put a cow out to hay last year that was 19 years old and she had a calf. I wouldn't say as a general rule that a cow of 11 is getting to the end of the line, and that a cow of eight is beginning to go down grade. It depends on the individual;; some cows will start down at that and some won't; I wouldn't give a general rule.

CLINT HOLLOMAN—Direct Examination.

R. 74. Tr. 375. In lieu of the last two sentences of the second paragraph of Direct Examination, insert:

The bull has only been off the Good Earth Farm for about two hours when he was taken for sale and as a reference sire at the Triple A ranch. We had bred some heifers to him. It means that he was a kind of a featured sire. It was not over two hours.

R. 75. Second line, top of page, after the sentence, "He died of disease," insert:

We had five veterinarians checking him.

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As shown at page 384 of the transcript, Record 76, Defendant's Exhibit E, being the judgment in the agister's lien suit, was admitted in the evidence by stipulation of the parties. The appellant's record does not set forth this judgment, which was pleaded in the fourth defense in the defendant's amended answer to each Count of the plaintiff's complaint herein (R. 11, 12), as res judicata of the ownership of the cattle in question and the status of the parties as a bar to plaintiff's action. Said omitted Exhibit E is as follows:

(Exhibit E.)

Be It Remembered, That on this 25th day of August, 1953, appeared Honorable O. A. Kamp, Judge of Magistrate Court.

Whereupon by order of the Judge, Court was opened.

| | | |
|---|---|---|
| Joseph Keshner, Plaintiff, vs. (Case #1301) Martin M. Wick, Defendant. | } | Suit to Enforce Agister's Lien. |

Now on this day on which this cause is returnable and set for trial, comes plaintiff in person and with counsel, George A. Spencer, and defendant having been

duly notified of this proceedings by publication of notice, one week in the Montgomery Standard, a weekly newspaper of Montgomery County, Missouri, and proof of publication of notice having been filed; said notice to defendant having been ordered by the Court after Sheriff had made return on summons showing defendant not found in the County; and in addition to the order of publication of notice to defendant aforesaid, the Court having further ordered that defendant a non-resident, be notified further by the mailing of a copy of the petition and a copy of the order of publication by registered mail to defendant Martin M. Wick, of Highland, Illinois, to be receipted for by addressee only and the return receipt signed by Martin M. Wick having been returned and filed in this Court all in accordance with the law; and although defendant having been duly summoned and notified of this proceeding in accordance with law, comes not but makes default, and the Court, having heard the evidence, doth consider and adjudge that the plaintiff is a resident of Montgomery County, Missouri, and within the jurisdiction of this Court, and is entitled to and have his lien upon the following described property, to-wit:

(Here are inserted the names, dates of birth, registration numbers and tattoo, and chain numbers of the 15 cows sold to plaintiff.)

and the ten calves born to the above cows, numbering ten, which have not been recorded, chained or tattooed, and the 1952 calves, listed as follows:

(Here follow the names and chain numbers of dams, sex of calves, birth dates and names of calves and chain numbers of calves born in 1952, from March 14, 1952, 13 in number, the evidence showing that two of the calves born in 1952 to said cows had died. The list of said cows and calves corresponds to the list shown in Plaintiff's Exhibit 20, R. 45, except for those born after registration certificates were sent to Mr. Wick.)

and that the plaintiff have and recover judgment for the sum of Six Thousand Two Hundred Thirty-one Dollars and Fifty Cents ($6,231.50) against the defendant for the labor, feed, care, mineral, salt, train-

ing and keep for the above described property, furnished by plaintiff to the defendant, which property the Court finds to be located on plaintiff's farm and within the jurisdiction of this court, and for his costs herein, and it is ordered that the property hereinbefore described and adjudged charged with said lien be taken and sold to satisfy said lien and judgment.

---

(Here follows Certificate by the Clerk of the Magistrate Court of true copy.)

There being no dispute about the sufficiency of the petition (Plaintiff's Exhibit 18), the order of publication of notice to Martin M. Wick, defendant, in the agister's lien suit (Defendant's Exhibit B), and the special execution and report of sale by the Sheriff, duly certified and authenticated (Plaintiff's Exhibit 19), they need not be further copied or transcribed.

---

FILED
AUG 2 1957
JOHN T. FEY, Clerk

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 340

JOSEPH KESHNER,
Petitioner,

vs.

MARTIN M. WICK,
Respondent.

## PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals for the Eighth Circuit.**

GEORGE A. SPENCER,
Guitar Building,
Columbia, Missouri,
WILDER LUCAS,
RALPH T. FINLEY,
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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. .....

JOSEPH KESHNER,
Petitioner,

vs.

MARTIN M. WICK,
Respondent.

## PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals for the Eighth Circuit.**

### OPINIONS BELOW.

The opinion of the District Court for the Eastern Division of the Eastern Judicial District of Missouri, in the case here involved, Martin M. Wick, Plaintiff, vs. Joseph Keshner, Defendant, appears in the appellant's printed record in the Court of Appeals, pages 76-82. We do not find it reported in the Federal Supplement.

The opinion of the Court of Appeals in said cause, rendered May 7, 1957, appears in the certified copy of the record of proceedings filed herewith, and is printed in the appendix hereto, and is reported in 244 F. (2d) 146.

## JURISDICTION.

The judgment of the Court of Appeals was rendered May 7, 1957, and the petitioner filed in said Court of Appeals a motion for leave to file a motion in the District Court to vacate the judgment against him for $3,111.50, pursuant to Rule 60 (b) (4) of the Federal Rules of Civil Procedure, on the ground that said judgment below is void. Said motion also prays the Court to modify its opinion in the concluding paragraph thereof, wherein the Court holds that the judgment, as entered, is presumptively correct, and that even if the judgment were vulnerable to attack, as not warranted by the pleadings, the Court might assume that the pleadings had been amended to conform with the proof admitted in evidence without objection, the grounds for modifying said opinion being that the portion indicated would prejudge a motion to vacate the judgment under said Section 60 (b) (4).

Said motion was denied June 27, 1957.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

## QUESTIONS PRESENTED.

1. The first question presented is whether or not the judgment rendered by the District Court for $3,111.15, against the petitioner, defendant below, is void, and should be treated as a nullity, on the ground that the complaint, in Count II thereof for breach of contract, makes no reference to the agister's lien judgment, nor does it allege a breach of the contract for the feeding, breeding and care of the cattle, nor does said Count II allege or pray for any damages for breach of contract, based on overcharges in the account for the breeding, feeding and care of the cattle. Having found for the defendant on

every allegation of fraud and misrepresentation alleged as grounds of action in both Counts I and II, the District Court had no power or jurisdiction to render a judgment beyond the allegations of said Count II, without according to the defendant, respondent Keshner, an opportunity to be heard on said unpleaded issue, and the rendition of such judgment under the pleadings and evidence and facts in the case would deprive the petitioner of his property without due process of law, in violation of Amendment V of the Constitution of the United States (28 U. S. C., Constitution of the United States, Amendment V).

2. One of the defenses in each count was that the complaint fails to state a claim against the defendant upon which relief can be granted (R. 8, 12). Also, at the close of plaintiff's case (R. 58) defendant offered a motion to dismiss on the ground that under the facts and the law the plaintiff had shown no right to relief. The sufficiency of plaintiff's case was also attacked by motion at the end of all of the evidence, on the ground that under the facts and the law the plaintiff had shown no right to relief (R. 75-76). Conceding that under Rule 54 (c) in a proper case a plaintiff is entitled to judgment, whether demanded in the pleadings or not, this does not authorize the Court to give relief to which the plaintiff is not entitled. In this case defendant offered in evidence a letter written by plaintiff to defendant, Defendant's Exhibit B, which is an unequivocal rescission of the contract relied on in Count II, including the agreement with reference to keeping, breeding and feeding the cattle. All the evidence shows that the plaintiff also refused to pay the bill involved in the agister's lien suit.

3. A third question presented is that if the District Court, without pleadings or proof, went beyond the record and theory of the parties at the trial in rendering the judgment for $3,111.50 against defendant, as set forth in

the preceding paragraphs 1 and 2, could the Court of Appeals avoid the consequences of the unwarranted act of the District Court by assuming that the pleadings were amended to conform to the proof. The petitioner claims this could not be constitutionally done, and neither the District Court nor the Court of Appeals had jurisdiction to render or approve such judgment. This is further so because under the rules permitting amendments to conform to proof, the amendment must be one that is supported by the record, and authorized by the law. In other words, the petitioner asserts that the Court of Appeals had no power to assume an amendment in a respect not supported by the law and the evidence, especially where constitutional rights are involved.

4. The fourth question presented is on the action of the Court of Appeals, which denied appellee's motion for leave to file a motion in the District Court to vacate the judgment for $3,111.50 against appellee as void for want of jurisdiction of said Court to render the same, and also to modify its opinion, so far as it prejudges any attack upon the judgment of the District Court in this cause under Rule 60 (b) (4) of the Federal Rules of Civil Procedure, and to stay the judgment aforesaid, until determination of such motion to vacate.

5. A fifth question is presented as to the collateral attack made by the Court on the agister's lien judgment. It is submitted that under the law and decisions of Missouri, such a judgment could not be collaterally attacked, so far as the amount recovered in that suit is concerned, and so far as the res and the proceeds of sale are concerned, and the judgment of the District Court was rendered without jurisdiction to do so, and the Court of Appeals had no jurisdiction to affirm the same.

## STATUTES AND CONSTITUTIONAL PROVISION INVOLVED.

28 U. S. C., Rule 73 (b) of Federal Rules of Civil Procedure:

> "(b) Notice of Appeal. The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall name the court to which the appeal is taken. * * *"

28 U. S. C., Constitution, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation."

28 U. S. C., Rule 54 (c) of Federal Rules of Civil Procedure:

> "(c) Demand for Judgment. * * * Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

## STATEMENT.

This action was brought by Martin M. Wick, Plaintiff, against Joseph Keshner, Defendant, in the District Court for the Eastern Division of the Eastern District of Missouri by complaint in two counts.

In referring in this Petition to the printed record, Appellant's record is indicated by a capital R, and reference to Appellee's supplemental record is by the abbreviation S. R.

The jurisdiction of the Court is alleged to rest upon the diversity of citizenship, the plaintiff being a citizen and resident of the State of Illinois, and the defendant a citizen and resident of the State of Missouri, and the matter in controversy, exclusive of interest and costs, is alleged to exceed $3,000.00 (R. 1).

The Answer admits the allegation as to the jurisdiction of the District Court (R. 8, 12). Both counts deal with an alleged contract for the sale by defendant to plaintiff of 15 cows at the price of $1,000.00 per head.

Count I (I-7), is based on the theory that a confidential relationship of trust existed between plaintiff and defendant on which plaintiff was entitled to rely. This arose, plaintiff alleges, because of his inexperience in the cattle business, and the considerable experience of the defendant, thereby conferring the duty of trustee on defendant as regarded plaintiff. Plaintiff also alleged that defendant represented to plaintiff that the cattle to be sold to plaintiff were for $1,000.00 per head would actually be worth $2,000.00 per head and that plaintiff would make 25% return on investment in cattle after the herd had increased to 30 in number, and that defendant would return to plaintiff the purchase money if he at any time were dissatisfied with the transaction or needed money; that the cows would be heifers and young matrons, not over 2 years of

age; that nine of the cattle delivered to plaintiff were from 7 to 11 years old; that they were, in fact, worth less than $300.00 per head, and that because of the confidential relationship existing between the parties, there was a breach of trust on the part of the defendant by so allocating such animals to plaintiff, which constituted fraud and entitled plaintiff to a refund of the $15,000.00 paid to the defendant for the cattle on February 9, 1952.

The complaint was alleged in count I, paragraph 4 (R. 3), that the defendant would keep the cattle for the plaintiff and feed, breed, and maintain the same and that the cost to the plaintiff would not exceed $200.00 per year per head, such cattle to be kept on defendant's stock farm; and it is alleged in paragraph 9 of Count I (R. 5), that upon learning the ages, characteristics and value of the cattle, plaintiff became dubious of the transaction and fearful of his investment and demanded the return of his money. In paragraph 10 (R. 5), plaintiff alleges that he had at no time acquiesced in allotment of the cattle to him and at all times repudiated and demanded the return of his investment; and that defendant did not perform and comply with his representations and that the entire transaction was a conscious and deliberate effort to obtain plaintiff's money without giving him value in return. The prayer of count I was for the return of the purchase price with interest and for punitive or exemplary damages in the amount of $15,000.00.

Count II realleges by reference the paragraphs of count I as to the terms of the sale, the representations made, but omitted the allegations with reference to the fiduciary and trust relationship. Count alleges that the agreement was breached because of the failure on the part of defendant to perform for the reasons stated in count I. In paragraph 4 of count II, the plaintiff alleges that by reason of the foregoing, the defendant breached his contract with the plaintiff, and such breach has damaged the plain-

tiff in the sum of $15,000.00, the amount invested with the defendant, which has now become lost to him. The prayer is for $15,000.00 actual damages and $15,000.00 punitive damages (R. 6-7).

The answer to Count I (Third Defense, paragraph 4, R. 8-9), alleges that the plaintiff became acquainted with the defendant prior to 1952 and that after plaintiff had advised defendant that he desired to purchase some Aberdeen Angus cattle, that defendant told plaintiff that the cost of keeping, feeding, breeding, and maintaining animals by the month would not exceed on the average $200.00 per year per head until the plaintiff could locate a farm and move the cattle; that defendant showed plaintiff 15 head of cattle that he would sell him at $1,000.00 per head and on February 9, 1952 plaintiff purchased 15 head from the group of defendant's cattle and paid for them; that thereafter during 1952 the plaintiff visited defendant's farm, discussed "his" cattle, looked at farms to purchase in the community, brought his friends to defendant's farm and showed them "his" cattle, but denies all other allegations with reference to the misrepresentations and fraud charges (R. 9-10). It is also alleged that the plaintiff, after he had visited defendant's farm and after the drop in the price of cattle, requested defendant to return his money, which defendant refused to do. Defendant also alleges that plaintiff, after requests at arious times, refused to pay for the said maintenance and breeding of the animals and that finally defendant instituted legal proceedings before a Magistrate in Montgomery County, Missouri, for the sale of the animals, for the feeding, maintenance, and breeding charges (R. 10).

The Fourth Defense to count I (R. 11-12), sets up the judgment of the Magistrate Court in Montgomery County, Missouri for $6,231.50 for the feeding, breeding, and caring for said cattle of the plaintiff, and pleads said judgment

is res judicata and a bar to the plaintiff's claim that he was not the owner of said cows and had not accepted them, and a bar to his action. The said Fourth Defense to count I is incorporated by reference as a defense to count II (R. 12-13).

At the trial, Joseph Keshner, placed upon the stand by plaintiff (R. 14), testified to his version of the contract that he sold 15 bred cows to the plaintiff for $15,000.00 (R. 14-15), and gave the chain numbers by which he identified the cows sold to plaintiff (R. 15-16). He kept the registration certificates of the cows in order to register the calves. The cows were bred to his bull, Prince Eric 5th of GE. (R. 31). He gave the dates the first 11 cows gave birth to calves, and testified that all were bred and had calves in 1952 (R. 33). An examination of the tabulation, Plaintiff's Exhibit 20 (R. 45) shows that 15 calves were born in 1952, and separately sold at the agister's lien sale, and when the cows were sold, most of them were sold with calf at side in 1953.

There was evidence pro and con on the alleged misrepresentations, which need not be repeated here, in view of the holding of the District Court.

Defendant's Exhibit E, the judgment of the Magistrate Court in the suit against Wick for payment for keeping, feeding, breeding, and caring for the cattle, was offered by defendant (R. 76), but not transcribed in full, and is incorporated in appellee's supplemental record (S. R. 35-37), and the statement of the account or petition in the Magistrate Court, Plaintiff's Exhibit 18 (R. 29), the order of publication against Wick in that suit, as a nonresident, Defendant's Exhibit B (R. 75), and Plaintiff's Exhibit 19 (R. 44) the special execution in said court, were all certified and authenticated and offered by plaintiff by stipulation between the parties, except Defendant's Exhibit B, which was offered by defendant.

There being no dispute about the records in the Magistrate Court, or concerning the service by publication, which is recited as having been made in the special execution, Defendant's Exhibit 19, the Exhibits were not set forth in full, except the statement or petition (S. R. 35-37).

An examination of the record shows that the plaintiff offered the record in the Magistrate Court for the purpose of trying to prove that there was some error in the registration certificates or pedigrees of the cows and calves (R. 15-21, 25-29). Plaintiff also tried to attack the registration of the cows and calves (R. 60-62), and endeavored to show that the cows were not bred to a particular bull, although there was no alleged agreement that said cows should be bred to any particular bull (R. 68-70).

At the agister's lien sale in the Magistrate's Court, 28 animals were sold, and 11 of the 28 were cows with calf by side sold as one animal, so that there were 39 animals sold. Two of the calves had died, leaving 13, so that there would have been 41 in all if the two had lived.

The District Court (R. 76-81) found for the defendant and against the plaintiff on the allegation of fiduciary relationship and trust alleged in the complaint, and on every charge of misrepresentation and fraud.

Then the District Court (R. 81-82), without any allegation in the complaint, and particularly in Count II on breach of contract, held that the plaintiff, Keshner, in the agister's lien suit, was entitled to recover as damages only the sum of $2,700.00 for keeping, feeding and caring for the cows, being the first item in the account (R. 29). He disregarded the care of 6 heifers and 8 bulls, and disallowed all claims for care of the calves. He also disallowed the 1952 breeding, on the theory, as stated, that the cows were to be bred free the first year, but the evidence

shows that the cows were to be sold as bred cows, and thereafter they were to be bred at $100.00 per cow per year. In this connection the defendant, in his answer in this action below (third defense, paragraph 4) (R. 9), admitted that he agreed to keep the cattle for the plaintiff at a cost that would not exceed "on the average," $200.00 per year per head.

The record shows that the defendant Keshner filed a motion for new trial on Count II and a motion to amend the findings of fact, both of which were overruled (R. 92).

The defendant, petitioner, contends that he had no opportunity to meet the unpleaded cause of action upon which the judgment for $3,111.50 is based.

The plaintiff appealed from the judgment on both Counts I and II, not specifying that he was appealing from only part of the judgment (R. 90).

The appellee directed the attention of the Court of Appeals to the fact that the judgment for $3,111.50 on Count II was beyond the pleadings and void for various other reasons. The appellee contends that the District Court had no jurisdiction to render such judgment on Count II, and that the Court of Appeals had no jurisdiction to affirm it. After the decision by the Court of Appeals the appellee, Keshner, filed a motion for leave to file a motion in the District Court to vacate said judgment on Count II, and modify the latter part of its opinion prejudging any motion or proceeding which the appellee might wish to take, but the Court of Appeals denied the motion.

## ARGUMENT ON REASONS FOR GRANTING WRIT.

I.

From the earliest times, it has been held by this Court that where a Court renders a judgment in a case without giving the interested party an opportunity to be heard on the matter involved, such judgment is void.

In Windsor v. McVeigh, 23 L. Ed. 914, 93 U. S. 274, the lower Court had before it a case involving the seizure of property in rem, where a judgment had been rendered without proper notice to the interested parties. In holding the judgment void, the Supreme Court said (l. c. 277-278):

> "A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.
>
> "That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has any thing to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, Appear, and you shall be heard; and, when he has appeared, saying, your appearance shall not be recognized, and you shall not be heard. In the present case, the District

Court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence."

The foregoing principle has been frequently applied to cases where a judgment has been rendered which goes beyond the pleadings and issues in the case.

In Silvan Beach v. Koch, 140 F. (2d) 852, l. c. 861, Judge Sanborn, for the Eighth Circuit, said:

> "**In the absence of (1) notice to a party of the claim made against him, and (2) of a hearing or an opportunity to be heard in opposition thereto, a judgment entered upon the claim is a nullity.** (Citing many decisions of this Court.)
>
> "**A court may not, without the consent of all persons affected, enter a judgment which goes beyond the claim asserted in the pleadings.** (Citing three decisions of this Court and decisions of other Federal Courts.) * * * **A party is no more entitled to recover upon a claim not pleaded than he is to recover upon a claim pleaded but not proved.**"

In National Pigments & Chemical Co. v. Williams & Co., 94 F. (2d) 792, l. c. 798, where an issue was passed on by the Court, which was beyond the pleadings, the Court said, l. c. 698:

> "It is obvious that the controversy respecting the Stinson patent and the sale of Gelox is wholly outside the scope of the issues defined in the pleadings."

The Court eliminated the part of the judgment outside of the pleadings, and remanded the case, with instructions to modify in accordance with the opinion.

In Osage Oil & Ref. Co. v. Continental Oil Co., 34 F. (2d) 585, where the trial Court had undertaken to adjudge matters outside of the pleadings, the Court, as to such matters, said, l. c. 588:

> "Issues not raised by the pleadings cannot be determined. U. S. v. Goldstein (C. C. A. 8), 271 F. 838, 845. A decree, in so far as it undertakes to decide issues not made by the pleadings, is void (citing many cases). A Court is without jurisdiction to pass upon questions not submitted to it for decision (citing cases). **If the Court were without jurisdiction to determine such issues at the original trial, it would seem to follow that it was without jurisdiction to reserve such issues for future determination.**"

The petition in this case nowhere indicates any basis for damages for breach of the contract in question. There is nothing in the pleadings or evidence which indicates that the plaintiff intended or that the defendant was apprised that the plaintiff was seeking to recover damages for an alleged excess or mistake in the agister's lien judgment. However, in this case, the District Court is the one that made the mistake. How could the District Court have a right to say, without evidence, that a contract, which says a defendant shall charge not exceeding $200.00 per head per year for keeping, feeding, breeding and caring for the cattle, means that the defendant must feed the cattle separately and keep a separate record of what each animal costs to maintain? The defendant pleaded in his answer (R. 9) that the agreement was that the cost of feeding, keeping, breeding and caring for the cattle would not exceed "on the average" $200.00 per year per head, and denied that the contract was as pleaded by the plaintiff, and the Court, for some unknown reason, sought to make defendant pay more for the upkeep of the cattle than the plaintiff would be required to pay under the theory of the said District Court. The District Court was himself mis-

taken in the facts when he said that Keshner had no right to charge $1,500.00 for the 1952 breeding, because the 1952 breeding was for 1953 calves. The 1952 calves were born between March 8, 1952, and December 15, 1952. The cows were therefore bred in 1951, and were properly sold as bred cows. The 1953 calves, for the most part, were already born when the judgment in the agister's lien suit was rendered (Plaintiff's Exhibit 20, R. 45). The Court committed a gross wrong when he gave judgment without permitting the defendant to offer evidence to show what the terms of the contract meant in the cattle business.

Furthermore, the Court erred in taking upon himself, without evidence, to say that the provision that the cost of keeping, feeding and breeding of the cattle applied only to the cows. That is a very unreasonable construction, because the calves and yearlings and two-year-old bulls and heifers require more attention, care and expense, as a rule, than do the adult cows. Again, the contract was for an indefinite duration, and under the construction of the contract given by the Court, when the herd reached sixty or more, Keshner would still have to charge only $200.00 per year per head for 15 cows. The parties manifestly intended that Mr. Keshner should be paid for the upkeep of the calves and offspring of the cows, as well as for the cows themselves.

These considerations show how unreasonable and arbitrary the act of the Court was in rendering a judgment beyond the pleadings, on a theory never presented at the trial, and therefore depriving the defendant of his property without due process of law. Such judgment is therefore void, and should be ordered vacated by this Court.

II.

It is true that under Rule 54 (c), the lack of a prayer is no ground for denying a plaintiff the right to a judgment on a cause of action stated, but a judgment must

be supported by a cause of action stated in the pleadings. However, under some circumstances, the lack of a prayer may indicate the intention of the pleader, or a prayer for one thing may indicate that the pleader is not relying upon something else.

K. C., St. L. & C. R. Co. v. Alton R. Co., 124 F. (2d) 780, 783.

In this case, the record fails to show any mention of any claim by the plaintiff that the contract was breached by obtaining judgment in the Magistrate Court for the recovery of the cost of feeding, breeding and keeping plaintiff's cattle. But the plaintiff had no cause of action, because by his letter of December 19, 1952 (Plaintiff's Exhibit B, R. 42-43), he unequivocally notified the defendant that he had rescinded the sale, and was not interested in anything except the complete refund of his investment. Another letter from plaintiff (Defendant's Exhibit D, R. 43) declares the sale void. The plaintiff had also breached the contract by failure to pay for the keep of the cattle.

In 12 Am. Jur. 1031-1033, Sec. 451, the other necessary prerequisite to a rescission, namely, a restoration of the defendant to the status quo, is stated as follows:

> "**The very idea of rescinding a contract implies that what has been parted with shall be restored on both sides.** Releasing one party from his part of the agreement and excusing him from making the other party whole do not seem agreeable to reason or justice. **Hence, the general rule is that a party who wishes to rescind an agreement must place the opposite party in status quo.** An attempted restoration of the status quo **is an essential part of rescission of a contract.** • • • Ordinarily, before an action at law based upon rescission of a voidable contract can be maintained, such restitution of what the plaintiff has received by

virtue of the contract as is necessary to put the other party back in the position he was in prior to the making of the contract must be made or attempted."

This has always been the law in Missouri.

Schurtz v. Cushing, 146 S. W. (2d) 591, 594, 347 Mo. 113, 119;

Feld v. Roanoke Investment Co., 27 S. W. 635, 637, 123 Mo. 603, 619.

A party cannot affirm a contract in part and repudiate it in part. He cannot accept its benefits on the one hand, while he shirks its disadvantages on the other. He cannot play fast and loose in the matter.

Schurtz v. Cushing, 146 S. W. (2d) 591, 347 Mo. 113, 119;

Horne v. John A. Herte Co., 171 S. W. 598, 184 Mo. App. 725.

Rule 54 (c), therefore, could have no application, since that rule contemplates that the evidence shows that the plaintiff is entitled to recovery.

The same is true of another defense fully established by the evidence, namely, that the agister's lien suit is res judicata. Defendant pleaded in his answer (R. 11-13, Fourth Defense) the agister's lien judgment as res judicata in this case as to the ownership of the cows, which is what the Courts refer to as status or title, which is adjudicated by a suit in rem. Defendant did not know at that time that the Court would go beyond the pleadings and undertake to readjudicate matters decided by the agister's lien judgment. The plaintiff had never done so, and we submit that the Court had no power to try an issue which neither parties intended to try, and which defendant had no opportunity to try.

In its opinion, the Court of Appeals held (a) that the appellee, not having appealed, could not attack the judgment below, and (b) that if the petition be not sufficient to authorize the judgment awarded, the Appellate Court could assume that the pleadings had been amended to conform to the proof.

Even where amendments are allowed, it is the proper rule and practice to grant the defendant a continuance to meet the new issues and evidence thereunder.

Robbins v. Jordan, 181 F. (2d) 793.

But the rule authorizing amendments to conform to the evidence is applicable only when an issue has been tried by express or implied consent of the parties.

Keye v. Smithermen, 225 F. (2d) 583, 594-595.

There is no evidence showing an express or implied consent to try the issue put into the case by the District Court. Furthermore, it is a rule, sustained by many cases, that an amendment cannot be allowed to sustain an award inconsistent with that expressly prayed for.

Steffen v. U. S., 213 F. (2d) 266, 272 (Pars. 12-13).

But if an amendment be allowed to conform to proof, it would have to be an amendment authorizing a collateral attack upon the agister's lien judgment. This cannot be done.

Howland v. C. R. I. & P. Ry. Co., 36 S. W. 29, 30, 134 Mo. 474, 479;

Thomason v. Allen, 26 S. W. (2d) 609, 324 Mo. 1061, 1066-1067.

We assume the ruling of the Court is based upon Rule 15 (b), 28 U. S. C., Federal Rules of Civil Procedure,

which provides for amendments to conform to the evidence. There was certainly no express or implied consent shown by either party to relitigate the amount of the judgment in the agister's lien suit. To do that, the plaintiff would have had to make a direct attack upon that judgment in his petition. He could not have attacked the judgment collaterally.

Howland v. C. R. I. & P. Ry. Co., 36 S. W. 29, 30, 134 Mo. 474, 479;
31 Am. Jur. 167, Sec. 559.

There is no indication in the Rule that Congress intended to deprive any party of the right to be heard on the question involved. The whole theory of the Rule is that all parties had intentionally consented to the trial of the issue in question. That is not shown by the record in this case. No case has held, so far as we have found, that pleadings can be amended to include an issue on which, as a matter of law, under the evidence, the plaintiff is not entitled to recover.

Other cases which sustain our position on this question are as follows:

Simms v. Andrews, 118 F. (2d) 803, 805-807;
U. S. v. City of Brookhaven, 134 F. (2d) 442, 446;
Apex Smelting Co. v. Burns, 175 F. (2d) 978, 981-982.

In the Simms case above cited, Syllabus 8, 118 F. (2d) 803, l. c. 897, the Court held that where evidence was common and material on certain issues in the case, the rule permitting amendments did not authorize a finding that the issue was tried on an unpleaded theory.

The injustice of an assumption of such an amendment in this case is shown by the fact that when plaintiff rescinded the contract, demanded his money back, and refused to pay for the keep of his cattle, he breached his contract, and that was long before the suit was brought in the Magistrate Court. In other words, the loss, if any,

that the defendant suffered by being forced to sell the cattle without registration certificates (see opinion of the District Court, R. 80-81), so that the cattle would not bring sufficient to pay the costs and expenses of the suit and the amount of the defendant's claim, was caused by the plaintiff's breach of the contract. It is well settled by all of the authorities that one who elects to rescind a contract cannot afterwards sue for breach of the contract.

> La Cueva Ranch Co. v. Brewer, 283 Fed. 963, 964;
> Boeing Airplane Co. v. Aeronautical Industrial Dist., 188 F. (2d) 356 (affirming 91 F. Supp. 596);
> Sylvania Industrial Corp. v. Lilienfeld's Estate, 132 F. (2d) 887, 893.

Such is the law in Missouri.

> Rosen v. Alside, Inc., 248 S. W. (2d) (Mo. Sup.) 638, 643-644;
> Cosgrove v. Leonard Merc. & Realty Co., 74 S. W. 986, 990, 175 Mo. 100, 111.

In the Boeing case, above cited, the Court of Appeals adopted the opinion by the District Court, 91 F. Supp. 596, 612-613, which covers this case like a blanket.

In Sylvan Beach v. Koch, 140 F. (2d) 852, above quoted, the Court, after stating the rules with respect to denying recovery upon a claim not pleaded, further said:

> "The foregoing rules are all fundamental and state nothing more than the essentials of due process and of fair play. They assure to every person his day in court before judgment is pronounced against him. **They cannot be circumvented by allowing amendments to pleadings to change a cause of action after judgment or by giving notice of the entry of judgment or by entertaining motions to vacate a judgment after it has been entered.**"

After the Court of Appeals had filed its opinion affirming the judgment of the District Court, which was, we think, void for want of jurisdiction of said District Court to render the same, appellee filed a motion for leave to file a motion in the District Court to vacate the judgment for $3,111.50, under Rule 60 (b)(4), 28 U. S. C., Federal Rules of Civil Procedure, and to modify its opinion in the last paragraph thereof, so far as it prejudges any attack by appellee on the judgment of the District Court in this cause, and to stay said judgment until the determination of such motion to vacate.

The Court of Appeals therefore has affirmed the action of the District Court in rendering a judgment against the petitioner without an opportunity to be heard. The authorities seem to be conflicting, and it may be that it was unnecessary to file a motion in the Court of Appeals for leave to attack the void judgment, but even if appellee should bring an independent suit to set aside said judgment, he would be confronted by the dictum and prejudging holding of the Court of Appeals. Here again the appellee would be deprived of his day in court, because on the motion below to vacate the judgment he could offer the briefs filed with the District Court by the appellant Wick and his briefs in the Court of Appeals, which clearly show that he was as much surprised as defendant was when the District Court went outside of the record to take away from the petitioner what he had recovered in the agister's lien suit, when, as a matter of fact, the District Court was mistaken when it found that the $1,500.00 for 1952 breeding was for the first breeding. The record of the cattle sold (Plaintiff's Exhibit 20, R. 45) shows that 14 calves had been born to the cows in question at the time of the sale, and their births began on March 8, 1952, and the last birth was December 15, 1952. But the record also showed that 11 of the same cows had calves by side at the time of

the sale. In other words, after the cows calved in 1952, they were rebred by the defendant, and had calves in 1953.

The Court, in its opinion, also states that since the petitioner did not appeal, he could not raise the questions he has raised. When a judgment is void because a Court has gone beyond the record and rendered a judgment, without prior notice, and without giving the defendant an opportunity to be heard, he has exceeded his jurisdiction, and the judgment is void. It cannot be validated by the Court of Appeals, and any judgment of the Court of Appeals validating it is also unavailing.

This is shown by the authorities under point I of this argument.

The opinion also holds that there was no motion to elect. The answer challenges both counts for failure to state a cause of action, and the sufficiency of the evidence was challenged at the close of plaintiff's case and also at the close of all the evidence. It would seem, therefore, that no question of election is involved.

It is said in the opinion that by agreement between the parties, the cattle were left on defendant's farm, and defendant was to board them for an indefinite period at a reasonable "rental" (sic) not to exceed $200.00 per year per cow, for which he was to be paid by the plaintiff at least once every six months or a year. This reasoning affords no basis for attacking the Magistrate judgment. Plaintiff's complaint alleges that the defendant told plaintiff that profit from the investment would not be forthcoming until the herd allotted to him approximated 30 in number; "that cost of keeping, feeding, breeding and maintaining animals allotted to an investor would not exceed $200.00 per year per head" (R. 3). In his answer to that allegation, the defendant (R. 9) alleges that such cost of keeping, feeding, breeding and maintaining animals by the month "would not exceed on the average $200.00

per year per head" and denies all other allegations in plaintiff's complaint.

The evidence merely referred generally to the terms of the agreement to keep the cattle, beause there was no claim in the District Court as to any damages for overcharging for the keeping of the cattle. The defendant pleaded the agister's lien judgment as res judicata at least as to the title to and ownership of the cattle, and if the ownership was necessarily determined in the agister's lien suit, then the judgment was res judicata of the issues in this suit. But regardless of this matter, the agister's lien judgment is res judicata as to the res, that is, the cattle sold and the proceeds of such sale and the amount due. The Court overlooks the fact, too, that the judgment in the agister's lien suit cannot be collaterally attacked in the manner attempted by the District Court. How could defendant have made his defense on res judicata without offering the proceedings in the Magistrate Court? Offering it did not admit a claim not pleaded by plaintiff.

V.

The fifth question presented under this petition is with reference to the question of collateral attack on the agister's lien judgment. This question has been covered in our discussion under point III of this argument.

In conclusion, we submit that grave injustice has been done in this case, that the defendant has been deprived of his property without due process of law, under the Fifth Amendment to the Constitution of the United States, that the District Court had no jurisdiction to render the judgment for $3,111.50 against defendant because there was no intimation in the record or in Count II that any damages were claimed as a result of anything except the fraudulent misrepresentations alleged therein, and that the District Court, if he thought there should be a recovery under the

unpleaded grounds of damage, should have given the defendant an opportunity to show the meaning of the contract in the cattle business. If such had been done, the defendant would have in the record pertinent evidence upon which the Court could have determined the issue, and if against the defendant, defendant would have a better basis for his contentions on appeal.

The suggestion in the opinion that the defendant Keshner did not appeal and cannot attack the judgment is contrary to the authorities we have cited and to all authorities under similar facts. The lack of jurisdiction and the voidness of a judgment can be asserted by any interested party at any time, and even if the parties do not raise the question, it is the duty of the Appellate Court, itself, to consider the matter and disregard the judgment if it be void for lack of jurisdiction of the subject-matter. Furthermore, an appellee has a right to show there is no foundation for a judgment, and that the Court had no jurisdiction to render it. In this connection, the plaintiff has appealed from the whole judgment, and the Court should reverse the judgment for $3,111.50 against petitioner on plaintiff's appeal.

Your petitioner prays that a writ of certiorari be granted in order that these matters may be fully investigated and determined, in accordance with the law.

Respectfully submitted,

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Columbia, Missouri,

WILDER LUCAS,
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St. Louis 1, Missouri,

Attorneys for Petitioner.

# APPENDIX.

(OPINION.)

United States Court of Appeals
For the Eighth Circuit.

No. 15,686

Martin M. Wick, Appellant,

vs.

Joseph Keshner, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[May 7, 1957.]

Emerson Baetz for Appellant.

Wilder Lucas and George A. Spencer (Ralph T. Finley was with them on the brief), for Appellee.

Before Gardner, Chief Judge, and Johnsen, Circuit Judge, and Donovan, District Judge.

Gardner, Chief Judge.

This action was initiated by the filing of a complaint containing two counts. Appellant was plaintiff below and we shall refer to the parties as they were designated in the trial court. While the complaint contained two counts there was but one transaction involved and the counts of the complaint represent two versions of that transaction.

By the first count plaintiff sought to recover damages in the amount of $30,000 based upon a breach of a duty arising from a fiduciary relationship alleged to exist between the plaintiff and defendant. It was alleged that the defendant represented that he was engaged in the business of breeding, raising, buying and selling of beef cattle and other livestock and was a man of wide experience in his vocation and held himself out as an expert in the valuation, breeding, raising, buying and selling of beef cattle and other livestock; that plaintiff, on the other hand, was a pipe organ manufacturer without experience or knowledge in the business of breeding, raising, buying or selling of beef cattle or other livestock; that at the time mentioned in the complaint plaintiff and defendant discussed the possible investment of $15,000 by plaintiff in the business of beef cattle raising operated by defendant; that by way of inducement to such investment by plaintiff, defendant represented that if plaintiff would make such an investment he might realize a 25% per annum profit on such investment and that several other persons of wealth had made similar investments with him and that defendant was anxious to expand his clientele to include persons not engaged in agricultural pursuits; that defendant represented that in the event of such investment by the plaintiff defendant would either purchase animals for him or segregate animals from the defendant's herd and that thereafter defendant would keep, feed and maintain the animals, breeding them and crediting plaintiff with the progeny and that by reason of defendant's experience he was highly skilled in the art of buying and selling cattle and that by reason of his skill plaintiff's investment would be without risk of loss; that defendant represented that profit and income on such an investment would accrue to the investor when the herd allotted the investor reached thirty in number and that the cost of keeping, feeding, breeding and maintaining the animals allotted to an investor would not exceed $200 per year per head and that

the initial expense of feeding and maintaining would be borne by defendant until the investment had attained a profitable status and that defendant would have no obligation with respect to the physical keeping of the animals; that defendant represented that he was anxious to expand his clientele to the community of Highland, Illinois, where plaintiff resided, and that if plaintiff would invest with him defendant would personally allot to him at a price of $1,000 per head cattle of an actual value of $2,000 per head and would allot him cattle described as heifers and young matrons not over two years of age with pedigrees fully warranting the sum total of plaintiff's investment; that defendant represented that it was his uniform practice to offer to return to investors or purchasers such money invested or paid in the event of dissatisfaction on their part but that defendant had never experienced dissatisfaction on their part and had never been required to refund any money but that if plaintiff were at any time dissatisfied with his investment if made, defendant would refund his entire investment; that by reason of the statements and representations made to plaintiff by defendant plaintiff was induced to and did deliver and pay over to defendant the sum of $15,000 and defendant took, received and appropriated such sum; that notwithstanding the alleged confidential relationship existing between plaintiff and defendant, defendant failed to carry out and perform the representations and inducements made and did not exercise good faith in the use and employment of the money paid him by plaintiff in that initially the defendant failed and refused to allot any animals from his herds to the plaintiff and that upon the plaintiff's demand to be shown animals allotted to him the defendant segregated fifteen cows from his herds but that one was in excess of eleven years of age, one was in excess of nine years of age, four were in excess of eight years of age and three were in excess of seven years of age and that none had a pedigree or other characteristic which would make the average value of the

allotted animals $2,000 per head or would make the total value of the allotted animals $15,000 to equal the amount of money paid defendant by plaintiff; that the animals allotted to plaintiff were of a true and actual value not exceeding $300 per head; that upon learning the ages, characteristics and value of the animals allotted to him plaintiff demanded the return of his money, which demand the defendant refused and thereafter ordered plaintiff to remove from defendant's premises the animals allotted to plaintiff; that on the failure of plaintiff to remove the animals so allotted to him defendant billed plaintiff for feed, maintenance and breeding of the animals and upon plaintiff's failure to either remove the animals or pay the bills for feeding, maintenance and breeding defendant foreclosed his agister's lien resulting in the sale of the animals; that plaintiff had at no time acquiesced in the allotment of cattle made to him by defendant but had at all times repudiated it and demanded the return of his investment; that defendant did not intend to perform and comply with the representations made to plaintiff but, on the contrary, affirmatively intended not to perform and comply with such representations. Plaintiff then demanded judgment against defendant awarding him the return of the $15,000 paid to defendant by plaintiff and punitive damages in like amount.

In the second count of his complaint plaintiff seeks to recover for breach of contract, alleging that he purchased from defendant fifteen cows for the agreed price of $15,000. He realleges the charges of fraud in the inducement, the payment of the $15,000 and the alleged agreement to refund such money at any time in the event of plaintiff's dissatisfaction. It is then alleged that in reliance on these representations plaintiff paid to defendant the agreed purchase price but that defendant in disregard of his obligations under the said contract of sale delayed in allotting any animals from his herd to plaintiff and that

when he did allot them none of the cows had a value of $2,000 as agreed nor did the total value of the animals purchased amount to $15,000 but that the actual value of the animals did not exceed $300 per head, which defendant well knew. Plaintiff therefore charged defendant with a breach of his contract from which he allegedly suffered $15,000 in damages, being the amount invested, and then realleged the charges of fraud as alleged in Count I of his complaint and asked for $15,000 additional punitive damages.

By way of answer defendant denied all allegations of fraud or misrepresentation on his part, denied that the relations of the parties were confidential, admitted that he sold plaintiff fifteen head of cows at the agreed price of $15,000 and admitted that plaintiff had paid him the purchase price therefor, but denied that there was any agreement to refund plaintiff the purchase price if he should become dissatisfied with his bargain. Defendant also admitted that he agreed that he would keep plaintiff's cattle at $200 per year per head and feed, breed and maintain them until plaintiff could move them. Defendant affirmatively alleged that after the sale had occurred and the cows had given birth to calves the cows and calves were registered by defendant for plaintiff in plaintiff's name with the American Aberdeen Angus Association. Defendant further alleged that after a drop had occurred in the price of cattle in September of 1952 plaintiff requested his money back which defendant refused to give him; that after defendant had furnished plaintiff with the registration certificates of the cattle he asked plaintiff whether or not he wished to sell the calves that had been born to these cows as he had a purchaser for them who would pay from $250 to $300 per calf, but that plaintiff would not agree to that nor did he return the registration certificates on the calves so that they could be sold. Defendant further alleged that after plaintiff demanded return of the purchase

price paid for said cattle defendant repeatedly billed plaintiff for breeding, keeping, maintaining and feeding the fifteen cows and their progeny, which demands being declined defendant finally sued plaintiff to foreclose defendant's agister's lien against the fifteen cows and their progeny and in such proceeding recovered judgment in partial satisfaction of which the cattle were sold.

The answer to the second count, in substance, alleged that there was a sale of fifteen cows for $1,000 apiece, realleged substantially all of the matters set forth in answer to Count I of plaintiff's complaint and denied the confidential relationship between plaintiff and defendant and the allegations of purported representations made by defendant to plaintiff to induce plaintiff to enter into the contract.

The two causes of action were not pleaded in the alternative but so far as appears from the pleadings plaintiff was seeking to recover money judgments aggregating $60,000. There was no motion to require plaintiff to elect on which cause of action he would proceed. The action was tried to the court without a jury. It appeared from the evidence that at all times pertinent to the issues plaintiff was a man in his thirties and manager of a pipe organ manufacturing enterprise in Highland, Illinois. The defendant, a somewhat older man, operated a stock farm devoted to the breeding, raising, selling and maintenance of Aberdeen-Angus cattle near New Florence, Missouri. The plaintiff and defendant became acquainted through a young lady, one Mary Lou O'Haran, who was one of plaintiff's employees and in the early part of 1952 the plaintiff, defendant and Miss O'Haran made a trip to Oklahoma to attend a sale of Angus cattle and at the sale purchased an Angus cow for $3,000, each of the three furnishing $1,000 of the purchase price. During the course of the trip it developed that the plaintiff, for the purpose of investment, was interested in buying some Angus cattle.

Several days after the trip to Oklahoma the plaintiff went over to defendant's farm and purchased fifteen Angus cows from defendant for $15,000, which plaintiff paid at that time. Mary Lou O'Haran was with the plaintiff at the defendant's farm when the purchase was made.

At that time the defendant pointed out to plaintiff the cattle that he was purchasing, indicating that they had on double neck chains. By agreement between the parties the cattle were left on the defendant's farm and the defendant was to board them for an indefinite period of time at a reasonable rental not to exceed $200 per year per cow for which he was to be paid by the plaintiff at least once every six months or a year. Plaintiff had little knowledge of cattle, Angus bred or otherwise.

Between February 9 and September 20, 1952, the plaintiff made several trips to defendant's farm to look at his cattle, usually in company with Miss O'Haran. The testimony also shows that shortly after the transaction in question defendant took a trip to Hawaii and that not long after his return the fifteen cows in question were registered with the American Aberdeen Angus Breeders Association in the name of plaintiff and that several calves that had been born to said cows were also registered in plaintiff's name. On September 20, 1952, defendant conducted one of his cattle sales which the plaintiff attended. After this sale at the defendant's farm the plaintiff also attended a cattle sale at or near Columbia, Missouri, and one near Kansas City, Missouri. Following these cattle sales the plaintiff concluded that the cattle he had purchased were not worth what he had paid for them, that the defendant had misrepresented the facts to him and he asked the defendant to return his $15,000, which the defendant refused.

Following some correspondence and conversation between the parties defendant finally ordered plaintiff to remove his cattle from defendant's farm, which the plain-

tiff refused to do, and thereupon defendant made a demand against plaintiff for some $6,000 for feed and breeding purposes which plaintiff refused to pay. Thereafter, defendant filed suit for an agister's lien upon which he was given judgment for $6,231.50 by a magistrate in Montgomery County, Missouri. The fifteen cows and their fourteen calves were then sold by the sheriff for $6,650 at an execution sale and after the costs and fees, totaling $838.50 were paid, the defendant received $5,811.50 on his judgment. There was no written contract between the parties. The facts will be further developed in the course of this opinion.

On the evidence produced the court found the issues in favor of defendant so far as the causes of action pleaded were concerned, but found upon the evidence admitted without dispute that plaintiff was entitled to recover $3,111.50. The court specifically found, in effect, that the parties at all times pertinent to the issues here involved were dealing at arm's length and that no fiduciary relationship existed between them and that plaintiff did not turn over to defendant the sum of $15,000 or any other sum for investment as contended by him, but that plaintiff purchased fifteen Angus cows for $15,000 and gave defendant a check for same; that Mary Lou O'Haran, an employee of plaintiff, was with plaintiff at defendant's farm the day of the sale and that Miss O'Haran resided on a farm near Highland, Illinois, and began buying Aberdeen-Angus cattle in 1950 and at the time of trial owned six females, a bull and several calves of the Aberdeen-Angus breed; that "the defendant did not guarantee to the plaintiff that he would have a 25% return on his investment and that the investment would be without risk"; that "The defendant did not represent to plaintiff that the initial costs of boarding the cattle would be carried on by the defendant until the investment had attained a profitable status by reason of the production of progeny and

the sale thereof"; and that "The defendant did not represent that the 15 cattle he would sell the plaintiff were worth $2,000 per head, but that he would sell them to plaintiff for $1,000 per head". The findings will be further developed in the course of this opinion.

On the findings the court concluded as a matter of law that plaintiff was not entitled to recover on the causes of action pleaded in his complaint but, as heretofore noted, entered judgment for plaintiff in the sum of $3,111.50. From the judgment so entered plaintiff has appealed and seeks reversal on substantially the following grounds: (1) the court erred in concluding as a matter of law that no fiduciary relationship existed between plaintiff and defendant, (2) the court erred in not concluding as a matter of law that the fiduciary relationship existing between plaintiff and defendant prohibited defendant from allotting to plaintiff cattle of a reasonable value less than the amount paid defendant by plaintiff, (3) the court erred in failing to find that the cattle allotted to plaintiff by defendant were of a reasonable value less than the amount paid defendant by plaintiff and that defendant knew they were of such value, and (4) the court erred in not finding that regardless of whether there was a fiduciary relationship between the parties there was a breach of contract by defendant in allotting cattle not reasonably worth the money paid him by plaintiff.

In the final analysis it is clear that plaintiff bottoms his right to recover on the alleged fact that there existed between the plaintiff and defendant a fiduciary relationship which required defendant to act with the utmost good faith towards the plaintiff and not to overreach him for defendant's benefit. The short answer to this contention would seem to be that the court found that no such relationship existed between plaintiff and defendant and that in the transaction here involved they acted at arm's length. This finding is, of course, presumptively correct and

should not be set aside unless clearly erroneous. Rule 52 (a), Federal Rules of Civil Procedure. It is, however, urged by plaintiff that this finding is not sustained by the evidence. It is not our purpose to restate the evidence on this question in detail. Though it may be somewhat repetitious, we observe that the evidence shows that plaintiff was a successful business man, the head and owner of a manufacturing company, and a man of substantial means and business experience who could afford to and did fly his own airplane around the country. His interest in the cattle business, as previously stated, was aroused not by the defendant but by his employee, Miss O'Haran, who had purchased from the defendant two pure-bred Angus cows at $1,000 a head in 1950 and who had attended numerous sales of pure-bred Angus cattle where these were shown. She had taken leave from her work to attend one of the cattle sales in Texas in 1951 and plaintiff discussed with her before and after her departure the buying of Angus cattle. Plaintiff went to the International Show in the Fall of 1951. Miss O'Haran was then keeping Angus cattle which she owned on her father's farm. This young woman's mother introduced defendant to plaintiff at this International Show in Chicago and plaintiff expressed his interest in cattle at that time to defendant. Early in 1952 it appeared that plaintiff, defendant and Miss O'Haran attended two sales in Oklahoma, each buying a third interest in an Angus cow costing $3,000, and cattle were discussed, resulting in an offer by defendant to sell plaintiff fifteen head of pure-bred Angus cattle at $1,000 a head. The transaction, however, was not closed at that time but plaintiff returned to defendant's farm on February 9, 1952, and again took with him Miss O'Haran in whom he had great confidence as to her knowledge of pure-bred Angus cattle. In other words, plaintiff was not relying only upon what defendant might tell him about the cattle he was buying. By the time plaintiff purchased the cattle he had attended, according to the record in this case,

three showings and sales of pure-bred Angus cattle, including the International Show in Chicago. Miss O'Haran accompanied plaintiff when defendant pointed out to plaintiff the cattle he was intending to sell him. Plaintiff was looking for an investment of surplus funds. He had the advice and counsel of his trusted employee, Miss O'Haran, who had experience in the purchase and maintenance of Angus cattle. Defendant did not seek out the plaintiff and attempt to sell him Angus cattle. The cattle in question were accessible and visible to the plaintiff and his advisor and there was no effort to prevent plaintiff from thoroughly inspecting the quality of the cattle and ascertaining their market value.

To entitle plaintiff to recover not only must it be made to appear that he in fact relied upon the alleged misrepresentations of the seller, that he had a right to rely thereon, and that he was induced thereby to make the purchase, but it is generally held that where the buyer has an opportunity equal to that of the seller to investigate and ascertain the truth or falsity of the seller's representations with respect to the property, he has no right to rely upon the representations and cannot, in the absence of actual fraud on the part of the seller, avail himself of them. As said in **Dickinson v. Bankers Life & Casualty Company**, Mo., 283 S. W. 2d 658, cited with approval in **Woolfolk v. Jack Kennedy Chevrolet Company**, Mo., 296 S. W. 2d 511:

> "The law affords to every one a reasonable protection against fraud in dealing, but it is not an indulgent guardian which can go to the romantic length of giving protection against the consequence of indolence, folly or careless indifference to the ordinary and accessible means of information."

The court in the instant case therefore correctly held that no relationship of confidence or trust arose as a result of the dealings between plaintiff and defendant.

The suggestion that defendant selected the animals the plaintiff was buying is not borne out by the record. The record discloses that defendant merely pointed out which of the cattle he in fact owned which were the subject of the sale. This was necessary because other cattle in the herd belonged to other parties and no one else present had sufficient knowledge to point out which of the cattle were the subject of sale. Where, as here, the parties dealt at arm's length defendant might properly commend the property he was selling without being guilty of fraud or misrepresentations. This is commonly accepted as trade talk, seller's statements or puffing, and a statement as to value is universally held to be a representation as to which the doctrine of caveat emptor applies. It must also be borne in mind that there was testimony that the cattle purchased by plaintiff were worth $1,000 per head and the court specifically found that the proof did not establish that the cattle were not worth that amount and on this issue the burden of proof was on the plaintiff.

Plaintiff in his complaint charged the defendant with various alleged misstatements of fact and various alleged fraudulent acts and testified to such statements and acts. As to these it is significant that the court on conflicting evidence specifically and categorically found in favor of defendant. This is illustrated by the following findings:

"14): * * * the defendant did not guarantee to the plaintiff that he would have a 25% return on his investment and that the investment would be without risk.

"15): The defendant did not represent to plaintiff that the initial costs of boarding the cattle would be carried on by the defendant until the investment had attained a profitable status by reason of the production of progeny and the sale thereof.

"16): The defendant did not represent that the 15 cattle he would sell the plaintiff were worth $2,000 per head, but that he would sell them to plaintiff for $1,000 per head."

We are convinced that in finding in favor of defendant and against the plaintiff on the two causes of action set out in plaintiff's complaint the court committed no prejudicial error and the judgment in that regard is therefore affirmed.

It remains to consider the contention of defendant that the judgment in favor of plaintiff for $3,111.50 is unwarranted and void. Defendant is the appellee and he took no appeal from any part of the judgment. He was the successful litigant so far as the two causes of action pleaded in plaintiff's complaint are concerned. Not having filed a cross-appeal he cannot be heard to question the legality of the judgment as entered, nor can he allege error in its entry. **Peoria Ry. Co. v. United States**, 263 U. S. 528; **Devine v. Zimmerman**, 8 Cir., 133 F. 2d 850; **United States Fidelity & Guaranty Co. v. Sweeney**, 8 Cir., 80 F. 2d 235; **Blackhurst v. Johnson**, 8 Cir., 72 F. 2d 644; **Barnsdall Refining Corp. v. Cushman-Wilson Oil Co.**, 97 F. 2d 481. In **Peoria Ry. Co. v. United States**, supra, the court said:

"The appellees can be heard before this Court only in support of the decree which was rendered."

In **Devine v. Zimmerman**, supra, the appellees attempted to urge error in the dismissal of their complaint. In denying their right so to do we said, inter alia:

"In passing it should be observed that plaintiffs also complain of this action of the court in dismissing their complaint, but not having appealed they cannot be heard to complain of the judgment as entered."

The same rule was announced by this court in all the above cited cases. Thus, in **United States Fidelity & Guaranty Co. v. Sweeney**, supra, we said:

> "Ordinarily, an appellee who files no cross-appeal is bound by the judgment as entered."

And in **Blackhurst v. Johnson**, supra, in referring to the right of an appellee who has not filed a cross-appeal to urge error we said:

> "She has, however, not appealed, and questions decided adversely to a party who has not appealed will not be considered on appeal. Appellees can be heard only in support of the decree which was rendered."

We therefore pretermit any consideration of the grounds urged by defendant in support of his contention as the matter is not properly before us. The judgment as entered is presumptively correct and even if the part of the judgment now complained of by defendant were vulnerable to attack had he filed a cross-appeal on the ground that it was not warranted by the pleadings we might still, in support of the judgment, assume that the pleadings had been amended to conform with the proof admitted in evidence without objection. The judgment here complained of must therefore be sustained. It results that the judgment as entered is affirmed in its entirety.

**(Judgment.)**

United States Court of Appeals for the Eighth Circuit.

No. 15686. September Term, 1956.

Tuesday, May 7, 1957.

Martin M. Wick,

Appellant,

vs.

Joseph Keshner.

Appeal From the United States District Court
For the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and on the motion of appellee to tax cost of printing the supplemental record against the appellant, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in its entirety.

And it is further Ordered and Adjudged by this Court that the Motion of appellee to tax cost of printing the supplemental record against the appellant in this cause be, and it is hereby granted, and that Joseph Keshner have and recover against the appellant Martin M. Wick the sum of One Hundred Sixty-five and 60/100 ($165.60) Dollars, being the Clerk's fee for preparing the supplemental record for the printer in the sum of Ten and no/100 ($10.00) Dollars, and the sum of One Hundred Fifty-five and 60/100 ($155.60) Dollars, being the taxable printer's charge for printing the supplemental record, and have execution therefor.

May 7, 1957.

(Order denying Motion of Appellee for Order permitting him to file in District Court motion to set aside judgment, etc.)

United States Court of Appeals for the Eighth Circuit.

No. 15686. September Term, 1956.

Thursday, June 27, 1957.

Martin M. Wick,

Appellant,

vs.

Joseph Keshner.

Appeal From the United States District Court
For the Eastern District of Missouri.

After due consideration of the motion of appellee praying for order permitting him to file, in the District Court, a motion to set aside the judgment against him, for modification of opinion of this Court, and for remand of the cause to the District Court with directions to entertain motion by appellee to set aside the judgment, the brief of appellant in opposition to said motion and reply of appellee to brief of appellant in opposition, It is now here Ordered by this Court that the said motion of appellee, in this cause, be, and the same is hereby, in all respects denied.

June 27, 1957.

In the United States Court of Appeals
for the Eighth Circuit.

Martin M. Wick,

Appellant,

vs.

No. 15,686.
Civil.

Joseph Keshner,

Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri,
Eastern Division.

**MOTION OF APPELLEE FOR LEAVE TO FILE, IN THE DISTRICT COURT, MOTION TO VACATE THE JUDGMENT FOR $3,111.50 AGAINST THE APPELLEE, PURSUANT TO RULE 60 (b) (4) OF THE FEDERAL RULES OF PROCEDURE, ON THE GROUND THAT SAID JUDGMENT IS VOID.**

(Filed May 27, 1957. E. E. Koch, Clerk.)

To the Honorable Judges of the United States
Court of Appeals for the Eighth Circuit:

Now comes the appellee, Joseph Keshner, in the above enfitled cause, and respectfully represents to the Court:

I. That on May 7, 1957, this Court filed its opinion in this cause, affirming the judgment against the appellee on Count II of appellant's complaint, in the sum of $3,111.50; that in the hearing of the appellant's appeal, the appellee contended that the entire judgment, having been appealed from by the appellant, was in this Court for disposition, and that the judgment, being void upon the face of the record, was and is an absolute nullity, and should be dis-

regarded, because the relief awarded by said judgment on Count II of appellant's complaint was beyond the pleadings and prayer of said Count II. Said complaint appears on pages 1-7 of appellant's record herein, and appellee's answer to said complaint appears at pages 8-13 of said record. The judgment below appears at page 89 of said record.

II. For grounds of this motion, the appellee states:

1. That the complaint, in Count II thereof, is an action for damages for alleged breach of contract in the sale of fifteen head of cattle by the appellee to the appellant, and the grounds alleged in said count are based upon alleged false representations as to the value of the cattle and profits which appellee had made in the cattle business, and that similar profits would be forthcoming to the complainant, and also that the appellee agreed to sell and allot to appellant fifteen heifers or young matrons at the price of $1,000.00 per head, represented to be worth $2,000.00 per head, whereas there were allotted and delivered to the appellant six heifers and nine cows, of the ages of from four to eleven years.

Paragraph 4 of said Count II alleges as follows (R. p. 7):

> "**By reason of the foregoing, the defendant breached his contract with the plaintiff, and such breach has damaged the plaintiff in the sum of $15,000.00, the amount invested by the plaintiff with the defendant, which has now become lost to the plaintiff.**" (Emphasis added.)

The prayer of Count II (R. p. 27) is as follows:

> "Wherefore, the premises considered, plaintiff prays judgment against the defendant for actual damages in the sum of $15,000.00, and in addition punitive or exemplary damages in the sum of $15,000.00, and for his costs."

It is also alleged in paragraph 12 of Count I, and incorporated by reference in Count II, that the representations aforesaid were made to induce the appellant to pay over and invest with appellee the sum of $15,000.00, which contract the appellee did not intend to perform, and the entire transaction was a conscious and deliberate effort to obtain said sum of money from the appellant without giving him value in return, and that such effort being conscious and deliberate, was willful and malicious, and that the Court should award appellant punitive damages.

No reference is made in either count of the complaint to the Magistrate judgment by which the appellant's cattle were sold to satisfy the appellee's lien for the keeping and breeding of the cattle.

2. In his answer to both Counts I and II of the complaint, the appellee alleged that the complaint fails to state a claim against defendant (appellee) upon which relief can be granted. The appellee denied generally or specifically, all of the allegations as to fiduciary relationship and fraudulent representations alleged in the complaint, and each count thereof, except formal matters about which there is no dispute.

In his fourth defense, appellee set up a judgment of the Magistrate Court of Montgomery County, Missouri, in an action brought August 10, 1953, by appellee, Joseph Keshner, against appellant, Martin W. Wick, wherein the appellee obtained judgment for $6,231.50 for the keeping, boarding, feeding, caring for and training of the cows and the increase thereof, from February 9, 1952, to August 9, 1953, and said judgment is pleaded as a final adjudication of the ownership of said cows, and a bar to the complainant's action (Tr. 11-13).

3. The District Court found against the complainant on both counts, on every ground of action stated therein, finding specifically that there was no fiduciary relation-

ship between the parties, and no false representations made, and no fraud established (R. 76-81). The Court also found that under the agreement between the appellant and appellee, the cattle were left on the appellee's farm, and appellee was to keep and breed them for an indefinite period of time, at a reasonable amount, not to exceed $200.00 per cow per year (Tr, 77-81).

After finding for the appellee on both Counts I and II of appellant's cause of action, the Court further said (R. 81): "There is one further aspect to this case." Then the Court holds that there was an error in the judgment in the agister's lien suit, holding that the appellee was not entitled to recover for breeding the cows in 1952, because they were to be sold as bred cattle. The Court therefore held that the appellee was entitled to only $2,700.00 of the amount set up in the petition in the agister's lien suit, and that the appellant was entitled to recover on the second count the sum of $3,111.50, being the difference between the net proceeds of the sale and the sum of $2,700.00 (R. 81), and judgment was accordingly entered (R. 89).

4. On this appeal, the appellee, not by any claimed right as an appellant, but by reason of the fact that the judgment is void, has called the attention of the Court to the fact that the judgment is beyond the pleadings and prayer of the complaint, and should be treated as a nullity because contrary to the due process clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America (Appellee's Brief, pp. 22, 68-76).

The Court has denied appellee's right to so attack such judgment, on the ground that the appellee did not appeal, and cannot assert any defect in the judgment or appellant's right to recover. The defect being one going to the jurisdiction of the Court to render the judgment, and the

judgment being void, the appellee claims that the judgment can be attacked at any time wherever the issue is raised. The question of jurisdiction can be raised at any time where the judgment is in issue. This is especially true where, as here, the whole judgment is appealed from by plaintiff (appellant). Of course, appellee has not claimed, and does not claim, the right to attack the judgment for mere error.

In support of its action in denying appellee's contention, the Court has cited, on pages 14 and 15 of the opinion, various cases, including Peoria Ry. Co. v. U. S., 263 U. S. 528. The cases cited by the Court do not sustain the reasoning of the Court.

In Peoria Ry. Co. v. U. S., the Court was considering not a question of jurisdiction, but a mere matter of venue, and the Court said (263 U. S. 535-536):

> "**If there were a lack of jurisdiction in the district court over the subject matter, we should be obliged to take notice of the defect, even if not urged below by the appellee.** Mattingly v. Northwestern Virginia R. R. Co., 158 U. S. 53, 57. But the challenge is merely of the jurisdiction of the particular district. The objection is to the venue."

In Spencer v. Patey, 243 Fed. 555, l. c. 556, the Circuit Court of Appeals for the Second Circuit, after citing decisions of the Supreme Court to the effect that on every writ of error or appeal, the first question before the Court is that of jurisdiction, and that, "This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it", said:

> "Jurisdiction cannot be conferred by consent or the failure of the parties to raise the question in the trial court. * * * (Citing cases).

"'In short, if the court has no jurisdiction it cannot proceed, and when this appears, whether in the trial court or the appellate court, there is no alternative but to decline to entertain the cause. This being the law, we turn to the record and find a controversy of which the District Court has no jurisdiction upon the allegations or the proofs. The complaint alleges upon information and belief that the defendant is 'a joint stock association, with its principal business in the borough of Manhattan, city of of New York, and that the said Caleb S. Spencer is the treasurer thereof.' "'

That, of course, was said with reference to the jurisdiction of the Court over the entire cause of action.

In Street Grading District v. Hagadorn, 186 Fed. 451, 457, the Court said:

"Ordinarily no party can complain of an error procured or acquiesced in by him. (Citing cases.) But this rule cannot prevail when the trial court was without jurisdiction to enter the decree consented to. (Citing cases.)

"'It is also contended that, as no objection was made to the jurisdiction in equity on the ground that there was an adequate remedy at law, such objection was waived and cannot be raised for the first time in this court. This, we think, is untenable. The rule frequently announced and fully recognized that the existence of an adequate remedy at law cannot be raised for the first time in an appellate court is always subject to the qualification that jurisdiction over the subject-matter exists, and that the trial court is competent to grant the relief prayed for. (Citing many cases.) The doctrine of these cases is that the court for its own protection, and sua sponte, 'may prevent matters purely cognizable at law from being drawn

into chancery at the pleasure of the parties interested.' "

In this case, the record shows plainly that the Court went outside of the pleadings to give the relief on which the judgment against the appellee was rendered. The Court having no jurisdiction to do so, this Court should, sua sponte, declare the judgment void, and disregard it.

But this Court, in its opinion, apparently admitting that on the face of the record the District Court went beyond the pleadings and evidence to render the judgment in question, states that even if the sufficiency of the judgment were before the Court on appeal, this Court would assume that the pleadings had been amended to conform with the proof admitted in evidence without objection.

The first answer to this question is that there was no proof admitted in evidence for the purposes of sustaining any judgment based on a mistake in the agister's lien judgment. No evidence was offered for that purpose; it merely appears in the proceedings offered on other issues by the parties, without any intention, whatever, of attacking or defending a judgment to set aside the findings of the Magistrate Court.

In the second place, the conclusion of the Court is contrary to the authorities as to the right of this Court, in defense of the void judgment, to presume that the pleadings had been amended to support the judgment.

In Sylvan Beach v. Koch, 140 F. (2d) 852, 861-862, this Court, speaking through Judge Sanborn, said:

> "A court may not, without the consent of all persons affected, enter a judgment which goes beyond the claim asserted in the pleadings. (Citing cases.) * * * **A party is no more entitled to recover upon a claim not pleaded than he is to recover upon a claim pleaded but not proved.**

"The foregoing rules are all fundamental and state nothing more than the essentials of due process and of fair play. They assure to every person his day in court before judgment is pronounced against him. **They cannot be circumvented by allowing amendments to pleadings to change a cause of action after judgment or by giving notice of the entry of judgment or by entertaining motions to vacate a judgment after it has been entered.**"

That such is the law, is shown by the authorities cited at 140 F. (2d) l. c. 861, where Judge Sanborn said:

"In the absence of (1) notice to a party of the claim made against him, and (2) of a hearing or an opportunity to be heard in opposition thereto, a judgment entered upon the claim is a nullity." (Citing many Supreme Court and lower Federal Court cases.)

He further said (l. c. 861):

"A court may not, without the consent of all persons affected, enter a judgment which goes beyond the claim asserted in the pleadings." (Citing four Supreme Court decisions.)

If the Court could affirm a judgment entered beyond the pleadings by the mere statement that it would presume that the pleadings had been amended to conform to the proof, it would destroy the rights of a party in every case against whom a judgment had been rendered beyond the pleadings, and prevent a claim that the judgment was void on its face, or otherwise. The cases cited by Judge Sanborn in Sylvan Beach v. Koch, supra, fully sustain this conclusion, and we have found no case holding that an Appellate Court, in a situation of this kind, can assume that the complaint was amended to conform to proof in support of the judgment. The cases cited by Judge Sanborn are in addition to those cited under point III (1), page 22 of our brief on this appeal.

This is an ordinary action for breach of contract, the damages being the alleged loss of the purchase price. To permit the appellant, even if the cause were remanded, to amend for the purpose of setting aside the agister's lien judgment, would be beyond the power of the Court on the complaint in this case. Such a proceeding to set aside the agister's lien judgment would be a suit in equity, and could not be incorporated in a suit for damages for breach of a contract. This is especially true in view of the fact that the judgment in the agister's lien suit is res judicata as to the cattle and the proceeds of the sale of the cattle. The complaint below could not be allowed to overturn the judgment in the agister's lien suit. This is especially true under the decision of the Supreme Court in Howland v. C. R. I. & P. Ry. Co., 36 S. W. 29, 30, 134 Mo. 474, 479. This being true, there is no purpose in remanding the case, even under Federal Procedure Rule 60 (b) (4). The only applicable order would be to remand the case, with directions to the District Court to set aside the judgment for $3,111.50, as a nullity, and beyond the jurisdiction of the Court. This would not deprive the appellant of any right to be heard on the matter because he has no right, under the pleadings or under any possible amendment thereof, to set aside said agister's lien judgment. This is true if the judgment be void on the face of the record, which we think conclusively appears. And since no purpose could be served in remanding the case to the District Court, this Court should direct that the void judgment be vacated, if not at the appellee's suggestion, then of its own motion.

III. But if the Court should not agree with us, and is of the opinion that the matter can be remedied only by motion against the judgment as void under Federal Rules of Procedure, Rule No. 60 (b) (4), then we submit that the opinion should be modified on page 15, where it is stated that "the judgment as entered is presumptively correct and even if the judgment now complained of by de-

fendant were vulnerable to attack had he filed a cross-appeal on the ground that it was not warranted by the pleadings we might still, in support of the judgment, assume that the pleadings had been amended to conform with the proof admitted in evidence without objection." This portion of the opinion is contrary to the authorities we have cited, and all of the authorities we have been able to find on the subject. Such portion of the opinion, therefore, if any part thereof is retained by the Court, should be limited to a statement that the Court refuses to pass upon the question as to the validity of the judgment, and leave the matter open to the appellee to take such action as he may deem advisable concerning the judgment. To do otherwise would make this Court a party to the error of the trial Court in entering a judgment upon a claim not asserted, and which the complainant below could not have asserted under the law.

In this connection, we desire to call the Court's attention to certain facts as showing the injustice of affirming the judgment on the theory that the Court could assume that the pleadings had been amended to conform to the proof.

After the trial and submission below, the plaintiff below (appellant) Martin W. Wick, filed with the Court and served upon the appellee a brief in which he claimed under the first count $15,000.00 for the return of his investment, and $15,000.00 as punitive damages. The appellant, in his argument, relied, under Count I, on the fiduciary relationship alleged, and contended for his right to recover the purchase price because of the said fiduciary relationship and fraudulent representations.

Under the second count, the appellant in said brief stated that said count of the complaint constituted "an alternative presentation of the facts alleged in the first

count as a simple cause of action on contract, the theory stated being that the defendant, by allotting cattle other than of the ages, quality and value agreed upon, breached the agreement."

In the answering brief on submission, the appellee treated with the merits and also set up the agister's lien judgment as res judicata as to the status, title and facts established therein.

In appellant's reply brief, he contended that the judgment was not res judicata as to the facts in this case, except as to the property or res involved in the agister's lien suit. No mention, however, was made of any claim for any part of the proceeds of the sale under the agister's lien judgment, or any mention of relief from said judgment, or defect therein that should or could be corrected.

Throughout the trial of the case there was no claim of lack of jurisdiction of the Magistrate in the agister's lien suit, or any suggestion that plaintiff was attacking said judgment or asking any relief therefrom.

The concluding paragraph of appellant's reply brief below is as follows:

> "Under all the circumstances, we feel that plaintiff has proved a fiduciary relation, as he has alleged, entitling him to the rights of a cestui against defendant. We feel that the evidence, in the language of Judge Faris, quoted above, 'satisfies the mind and conscience' that defendant, as a fiduciary, fraudulently abused his trust and overreached the plaintiff by taking his $15,000 and giving him virtually nothing in return. **This being true, we believe that equity requires restitution to the plaintiff under Count I of his complaint, and the imposition of punitive damages by reason of the wrongful conduct of defendant. On the other hand,**

**if the Court does not feel that equitable relief is called for, then we submit that relief by way of damages should be allowed under Count II, and that those damages should equal plaintiff's loss, $15,000, with additional punitive damages."** (Emphasis ours.)

IV. That part of the judgment assessing damages for alleged breach of contract, in the sum of $3,111.50, based on alleged errors in the judgment of the Magistrate in the agister's lien suit, having no basis in the pleadings or prayer of the complaint, is for that reason absolutely void, and is also void for the further reason that under the evidence, by no manner of reasoning, can the sale of the cattle to satisfy the appellee's agister's lien for the keeping, care, breeding and feeding of appellant's cattle be considered as a breach of the contract for the sale of the cattle. This is so because, by various letters, beginning in September, 1952 (Plaintiff's Exhibits 9 and 11, R. 22-24), and culminating in appellant's letter of December 19, 1952 to appellee (Defendant's Exhibit B, R. 42), the appellant flatly and unconditionally rescinded the contract, particularly by the letter of December 19th, in which the appellant disaffirmed the sale of the cattle to him, and stated that he was interested only in one thing, and that was the complete refund of his money or investment (R. 42-43). The sale of the cattle and any loss resulting therefrom was the result of this breach of the contract by the appellant, himself. The District Court recited these facts in substance in its opinion and findings, and also more specifically held that the appellant disaffirmed the sale by letter of December 19, 1952, and refused to pay appellee's bill for the boarding and keeping of the cattle, and also did not return, or offer to return, the registration certificates on the cattle, so that the cattle could be sold as registered cattle, which latter fact affected the price realized at the agister's lien sale [Finding of fact 9 (R. 85-86); finding of fact No. 19 (R. 88)].

V. The judgment, being beyond the pleadings, and the record, conclusively showing that the appellee had no opportunity to show the Court, by further evidence, wherein the Court's conclusions as to the excessiveness of the judgment in the agister's lien suit were unfounded, the judgment is void, and the appellee is entitled, pursuant to Rule 60 (b) (4), by leave of this Court, to file a motion in the District Court to vacate said judgment as being void, and for the reasons herein stated, and also entitled to an order of this Court staying the mandate, for the purpose of giving appellee time to file such motion and have the same determined.

The appellee hereby offers to enter into bond to cover the costs and interest on the judgment which may accrue by reason of the delay in payment of said judgment, if the same be affirmed or not set aside, and upon such other reasonable conditions as the Court may determine.

**Wherefore**, the appellee prays:

1. For an order permitting the appellee to file, in the District Court, a motion to set aside the judgment against him herein, pursuant to the provisions of Rule 60 (b) (4) of the Federal Rules of Civil Procedure, upon the grounds in this motion stated, for the purpose of having said judgment for $3,111.50 vacated as void;

2. That the Court modify its opinion as in paragraph III of this motion suggested, by deleting from its opinion the portion thereof set forth in said paragraph III, so as not to prejudge appellee's motion to vacate the judgment;

3. That the cause be remanded to the District Court, with directions to entertain a motion by appellee to set aside said judgment as herein prayed, and to fix and approve a bond, to be signed by the appellee, with proper security satisfactory to the District Court;

4. And for such further orders and conditions as to the Court may seem necessary and proper.

Geo. A. Spencer,
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Wilder Lucas,
Ralph T. Finley,
2155 Railway Exchange Bldg.,
St. Louis 1, Missouri,
Attorneys for Appellee.

State of Missouri, } ss
City of St. Louis. }

Ralph T. Finley, being duly sworn, on his oath states that the facts stated in the foregoing motion are true, as he verily believes.

Ralph T. Finley.

Subscribed and sworn to before me this 27th day of May, 1957.

My term expires July 27, 1959.

Constance A. Wallis,
(Seal) Notary Public.

**Certificate of Counsel.**

I, Ralph T. Finley, a member of the bar of this Court, do hereby certify that the above and foregoing Motion is submitted in good faith, and is believed to be meritorious.

Ralph T. Finley.

[redacted]eceived two copies of the foregoing Motion on this [redacted]th day of May, 1957.

Emerson Baetz,
By Jane Scott,
Attorney for Appellant.

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AUG 23 1957
JOHN T. FEY, Clerk

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 403

JOSEPH KESHNER,
Petitioner and Cross-Respondent,

vs.

MARTIN M. WICK,
Respondent and Cross-Petitioner.

## PETITION FOR CROSS-WRIT OF CERTIORARI

**To the United States Court of Appeals for the Eighth Circuit.**

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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. .....

JOSEPH KESHNER,
Petitioner and Cross-Respondent,

vs.

MARTIN M. WICK,
Respondent and Cross-Petitioner.

## PETITION FOR CROSS-WRIT OF CERTIORARI

**To the United States Court of Appeals for the Eighth Circuit.**

The judgment of the Court of Appeals for the Eighth Circuit which is the subject of this petition for cross-writ of certiorari by Martin M. Wick is the same judgment which is the subject of a petition for writ of certiorari now on file in this Court in behalf of Joseph Keshner, respondent in this petition. It has not yet been acted upon by this Court. Martin M. Wick was the plaintiff in this cause in the District Court and the appellant in the Court of Appeals; Joseph Keshner was the defendant in this cause in the District Court and the appellee in the Court

of Appeals. Wick sought $15,000 actual and $15,000 punitive damages in his action in the District Court, but the District Court awarded him $3,111.50 only. He appealed to the Court of Appeals, alleging error in the failure to award him the larger amount. Keshner took no appeal. The Court of Appeals affirmed. Keshner's contentions in the Court of Appeals that the District Court was in error in awarding even the lesser sum were denied on the ground that since he had not appealed he could be heard only in support of the District Court judgment. Keshner's petition for certiorari now lodged in this Court seeks the review of this aspect of the judgment of the Court of Appeals; Wick's petition for a cross-writ, now presented, seeks the review of the judgment of the Court of Appeals in affirming the District Court as to its finding that Wick was not entitled to the larger sum originally sued for.

(a) **Reference to Reports of Opinions Below.**

The Judge of the District Court filed a written opinion. It is set forth in the printed record in the Court of Appeals, at pages 76-82. It is not reported officially or unofficially.

The opinion of the Court of Appeals is reported in 244 F. 2d at page 146. It is appended to this petition.

(b) **Grounds on Which Jurisdiction Is Invoked.**

(i)

The date of the judgment of the Court of Appeals sought to be reviewed is May 7, 1957.

(ii)

A petition for rehearing in the Court of Appeals was duly filed by the appellant there, cross-petitioner here. It was denied on May 31, 1957.

The statutory provision believed to confer on this Court jurisdiction to review the judgment is 28 U. S. C., Sec. 1254 (1).

**(c) Questions Presented for Review.**

The questions presented for review are:

1. Whether the decision of the Court of Appeals now sought to be reviewed has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervision when such decision is based upon an opinion which

(a) incorrectly construes a conclusion of law by the District Court as a finding of fact, and gives binding effect to it as such,

(b) reaches a conclusion which is patently a non-sequitur in respect of the facts recited, and

(c) ignores uncontradicted evidence, and voices conclusions inconsistent therewith.

2. Whether the decision of the Court of Appeals, based on an opinion subject to the infirmities aforesaid, has actually operated to deny to the cross-petitioner the review by the Court of Appeals to which he was under the law entitled.

**(d) No Constitutional or Statutory Provisions on Cross-Writ Sought.**

No constitutional provisions, treaties, statutes, ordinances or regulations are involved.

(e) **Concise Statement of Case.**

The claim upon which the action below was based arose out of a transaction between Wick, a manufacturer of Highland, Ill., and Keshner, a cattle trader and dealer of New Florence, Mo., in February, 1952. The transaction involved the payment by Wick to Keshner of the sum of $15,000, and the undertaking by Keshner to allot to Wick 15 Aberdeen-Angus cattle in consideration of the payment. The cattle were to be segregated, but they were to be kept for Wick on Keshner's stock ranch, The Good Earth Farm, near New Florence, for an indefinite period.

The exact nature of the transaction, in respect of its legal consequences, is a matter of controversy: Keshner contended below that it was a simple bargain and sale of 15 cows; while Wick contended that the circumstances of the transaction, including his inexperience contrasted with Keshner's experience and the conceded fact that the right of selection of the animals was lodged with Keshner, made it more than a simple bargain and sale and in fact made Keshner his fiduciary, accountable to him for the $15,000 payment as for a trust fund. Wick also contended that Keshner had represented to him, as an inducement to get him to invest, that the animals selected would be reasonably worth not merely $1,000 a head, the amount necessary to equal the investment, but $2,000 a head, the reason for his generosity being that Keshner wished to expand his clientele so as to include young businessmen of southern Illinois, and also that Keshner was in immediate need of cash for tax purposes.

Wick also contended that Keshner had agreed with him that he could withdraw his investment, or recapture his payment, on demand; and, in his complaint, recounted other circumstances, including representations by Keshner, inducing him to enter into the transaction.

The complaint set forth that Keshner, notwithstanding his obligation to allot animals having a fair value at least equal to Wick's investment of $15,000, allotted animals having a value of about one-half that sum; and Count I sought to charge Keshner as a fiduciary with the return of the sum deposited with or paid him. Count II was based on a simple contract theory that Keshner had agreed to allot animals worth at least the amount paid, but did not, and was thus liable to Wick.

Both counts recited that Keshner's default was willful and mala fides, and prayed punitive damages.

Defendant Keshner's amended answer admitted the payment of the $15,000 and the experience of Keshner as a cattle breeder and trader. It pleaded ignorance as to Wick's inexperience. It asserted the transaction was a simple sale, and denied all representations in connection therewith. It stated that six heifers and nine cows were "selected" from the defendant's herds and later "segregated," but it did not allege who selected or segregated them. The amended answer also challenged the adequacy of the complaint to state a claim, pleaded laches, and set up a Missouri in rem judgment in a suit by Keshner against Wick for feed and services to the allotted cattle. It also denied any undertaking by Keshner to return Wick's money if Wick were dissatisfied with the allotment made.

The cause was tried in the District Court without a jury. The District Judge ruled against Wick on his principal claim, but found that the judgment for feed and services obtained by Keshner was excessive in the amount of $3,111.50 and awarded Wick a judgment for that sum.

Wick's appeal to the Court of Appeals then followed, and it affirmed the District Court judgment in all respects.

(f) **Review of State Court Decision Not Involved.**

No review of a decision of a state court is here involved.

(g) **Basis of Federal Jurisdiction in First Instance.**

The basis for federal jurisdiction in the first instance in this cause was diversity of citizenship, Wick being a citizen of Illinois and Keshner a citizen of Missouri.

(h) **Argument Amplifying Reasons for Allowance of Cross-Writ.**

I.

The portion of the opinion of the Court of Appeals which determined the issue of fiduciary relationship adversely to the contention of Wick consists of approximately 800 words in three paragraphs, beginning with Paragraph [12] and ending with Paragraph [14]. Approximately 50 percentum of the language used was verbatim quotation from the defendant's brief, the only changes being the elimination of record references, the correction of grammar and the employment of additional and more forceful adjectives.

No case or authority cited by plaintiff was mentioned. The essential basis of plaintiff's contention that a fiduciary relation existed (a disparity in knowledge and experience in respect of cattle as between the parties) was not set forth.

Fairly analyzed, the opinion ruled that there existed no fiduciary relationship between the plaintiff and defendant in respect of the cattle transaction for the following reasons:

1. The trial judge found no such relationship existed; his finding is presumptively correct and should

not be set aside unless clearly erroneous under the provisions of Rule 52 (a) of the Federal Rules of Civil Procedure (Opinion, Par. [12]).

2. The evidence sustains a finding that no such relationship existed, because (Opinion, Par. [12]):

(a) Plaintiff was a successful business man, of substantial means and business experience, who could afford to and did fly his own airplane around the country,

(b) His interest in the cattle business was not aroused by the defendant, but by his own employee, Miss Mary Lou O'Haran, who had previously bought cows from the defendant and attended sales of Angus cattle; and plaintiff had discussed with her the buying of Angus cattle,

(c) Plaintiff went to the International Show at Chicago in the Fall of 1951: Miss O'Haran was then keeping cattle; plaintiff was introduced to defendant by Miss O'Haran's mother at the show; and plaintiff at that time expressed to defendant his interest in cattle,

(d) Shortly before the transaction in suit between plaintiff and defendant they, with Miss O'Haran, attended two cattle sales in Oklahoma, and each of them bought a one-third interest in a cow costing $3,000; and cattle were discussed then,

(e) Plaintiff had great confidence in Miss O'Haran's knowledge of pure-bred Angus cattle and brought her with him when the transaction was closed, and this showed that plaintiff was not relying only upon what defendant told him about the cattle,

(f) Before entering into the transaction with defendant, plaintiff had attended three showing and sales of pure-bred Angus cattle,

(g) Miss O'Haran was with plaintiff when the defendant pointed out the cattle which were to be the subject of the transaction between plaintiff and defendant,

(h) Plaintiff was looking for a place to invest surplus funds,

(i) Plaintiff had the advice and counsel of his trusted employee, Miss O'Haran, who had experience in the purchase and maintenance of cattle,

(j) Defendant did not seek out plaintiff and attempt to sell him Angus cattle, and

(k) The cattle were accessible and visible to plaintiff and Miss O'Haran and there was no effort made to prevent plaintiff from thoroughly inspecting them and ascertaining their value.

3. "To entitle plaintiff to recover not only must it be made to appear that he in fact relied upon the alleged misrepresentations of the seller, that he had a right to rely thereon, and that he was induced thereby to make the purchase, but it is generally held that where the buyer has an opportunity equal to that of the seller to investigate and ascertain the truth or falsity of the seller's representations with respect to the property, he has no right to rely upon the representations and cannot, in the absence of actual fraud on the part of the seller, avail himself of them. 'The law affords to everyone a reasonable protection against fraud in dealing, but it is not an indulgent guardian which can go to the romantic length of giving protection against the consequence of indolence, folly or careless indifference to the ordinary and accessible means of information' " (Opinion, par. [13]).

While Point 3, last quoted, may be correct as an abstract enunciation of law where a claimed misrepresentation is

presented without attending circumstances, we feel it is clear that it is without relevancy to the question of **Whether a Fiduciary Relation Exists**, and we will confine our remarks to the matters we have set out as Point 1 and Point 2.

## Point 1.

The Court of Appeals asserts that a short answer to ou contention of fiduciary relationship would be that the trial judge found that it did not exist, and that his findings, under Rule 52 (a) are presumptively correct and not be reversed unless clearly erroneous. But a finding that a legal relationship has not arisen from facts proved is not a finding of fact under Federal practice, but a conclusion of law, regardless of its appellation by the judge.

Dalehite v. United States, 346 U. S. 15, 24 (note);
Chandler v. United States (CA—7), 226 F. 2d 403, 405;
Guerrini v. United States (CA—2), 167 F. 2d 352, 356.

And a conclusion of law is not presumptively correct or immune to reversal unless clearly erroneous; to the contrary, its deliberate review is the function of appeal.

Kweskin v. Finkelstein (CA—7), 223 F. 2d 677, 678.

## Point 2.

The listing of Sub-points (a) to (k), inclusive, under Point 2, above, is a fair and accurate synopsis of the grounds put forth. If the recitations therein reflected are to be regarded as having any logical connection with the contention made by the plaintiff (that the disparity in knowledge respecting cattle between plaintiff and defendant gave rise to an obligation of fiduciary nature on the part of defendant) and with the disposition of that contention by the Court ("no relationship of trust or confidence arose," Opinion) they must be regarded as being put forward to establish one or the other of the following propositions:

(1) That plaintiff's knowledge of cattle at the time of the transaction in question was not markedly inferior to the knowledge possessed by defendant.

(2) That plaintiff, in the transaction, had the advice of a skilled cattle trader with knowledge of the subject equal to that possessed by defendant, and therefore any inequality which otherwise might have existed has been cancelled out.

(1)

If the purpose of the recitations was to show that plaintiff's knowledge was not markedly inferior to defendant's, then we respectfully submit that the Court ignored the specific finding of the trial judge to the contrary (Findings of Fact, Rec. 82):

"2): * * * The defendant, Joseph Keshner, has been in the cattle business since 1918, and has, since about fifteen years prior to the trial of this case, specialized in the business of buying, breeding, raising and selling Aberdeen-Angus cattle. The plaintiff had little knowledge of the cattle business at the time of the making of the contract involved in this case."

This finding, one of ultimate fact within the contemplation of the Federal rules, does have the binding character which the Court erroneously, we think, would ascribe to the conclusion that a relation of confidence did not exist. If any residue of doubt remains that the finding establishes the knowledge and experience of the defendant, then we respectfully refer to the fact, also overlooked by the Court and not mentioned by it in its summary of the pleadings (see p. 5), that defendant, in his answer (Paragraph 2), specifically admitted that "he [had] for a long time held himself out as and [was] an expert in the valuation, breeding, raising, buying and selling of beef cattle and other livestock" (Rec. 1, 8).

On the other hand, if the Court's purpose was to show that plaintiff acted with the advice and counsel of a skilled cattle trader, equal in knowledge and experience, to the defendant, then we feel and respectfully point out that the Court must have overlooked the record facts (a) that Miss O'Haran, at the time of the transaction, was 21 or 22 years old (Rec. 53), (2) that her cattle interests were evidently at most a hobby, pursued on her father's farm in her spare time as an employee of the organ factory (Rec. 53), and that she owned but six cows and bought her first cow 18 months previously (Rec. 53). To characterize her, even by implication or inference, in any way as the equal of defendant in respect of cattle knowledge seems almost incredible.

## II.

Plaintiff contended, as an essential part of his theory of fiduciary relationship, that the defendant selected the cattle that were allotted to him. The Court of Appeals dismissed his contention with three sentences (Opinion, Par. [15]):

> "The suggestion that defendant selected the animals the plaintiff was buying is not borne out by the record. The record discloses that defendant merely pointed out which of the cattle he in fact owned which were the subject of the sale. This was necessary because other cattle in the herd belonged to other parties and no one else present had sufficient knowledge to point out which of the cattle were the subject of the sale."

In so doing, the Court merely accepted at face value the argumentative assertion in defendant's brief, made without record references, and ignored the actual record, quoted in plaintiff's brief in extenso as follows:

The testimony of Wick (Rec. 39):

"We came on back to Good Earth Farm, and I agreed to invest in 15 cattle, which Keshner was to pick out. . . . All I knew was that I was giving him $15,000, and he in turn would pick but cattle.

"You could see the chains on the cows, but not the numbers. Keshner said, 'The cattle with the two chains are the cattle for you.'

"Keshner was picking out the cattle; not I."

The testimony of Keshner (Rec. 30):

"Q. (By Mr. Lucas) Did you at any time represent to him (Wick) out of what particular herd, prior to February 9, did you represent to him at any time out of what particular herd you were going to select the ones that you were going to sell him?

"A. (By Mr. Keshner) I told him I would pick them out of the Ellis herd that I had purchased.

. . . . . .

"Q. (By Mr. Lucas) And I believe you testified, did you not, that prior to accepting the check from plaintiff Wick, you went down and pointed out to him the cattle you were selling, is that right?

"A. (By Mr. Keshner) I did.

"Q. Tell us exactly what you did in connection with that.

"A. Well, he had a copy of the numbers that were—that I had chose for him."

The testimony of Mary Lou O'Haran, with Wick and Keshner when the transaction was originally planned and when Wick paid $15,000 to Keshner (Rec. 53):

"There was conversation about cattle on the trip [to Oklahoma, preceding the transaction in controversy]. Keshner told Wick, in substance, the glories of the cattle business. He told him the profit that was

to be made from it, the sales, the averages that were going on, the fact that Angus cattle were the best beef cattle in the world, and things of that sort. At one point Mr. Keshner said that the return would be about 25% on the investment; that it was just like clipping coupons. He said the cow drops a coupon once a year, and you can't lose if the Good Lord don't call them home.

"I next accompanied Mr. Wick to the Good Earth Farm on February 9. I wasn't present when Mr. Wick paid money to Mr. Keshner; I was in the kitchen. Mr. Wick, Mr. Keshner, my sister Pat and I walked into a field and looked at some cattle. About 25 or 30 were in the herd. Mr. Keshner said that among these were the cattle that he was going to allot to Mr. Wick."

## III.

As the selection by Keshner of the allotted animals was an essential part of Wick's case, so also was the value of the allotted animals. Wick had paid $15,000 for the allotment of 15 cows, and he placed on the stand two admitted cattle experts who testified that at the time of the allotment the 15 animals allotted were worth, on an average, not more than $507 (Rec. 46-50). Their testimony was without substantial contradiction. Yet the Court of Appeals, in its opinion, did not mention this evidence, but instead made the following statement (Opinion, Par. [15]):

> "It must also be borne in mind that there was testimony that the cattle purchased by plaintiff were worth $1,000 per head and the court specifically found that the proof did not establish that the cattle were not worth that amount and on this issue the burden of proof was on the plaintiff."

But there was no testimony that the cattle were worth $1,000 per head—the defendant himself, an admitted cattle

expert, did not so testify, and the closest approach to it was the testimony of a neighboring farmer who said he would have bought some at that price if he had the money (which he didn't have), and the District Court did not specifically find that the proof did not establish that the cattle were not worth that amount.

The alleged failure of the allotted cattle to have had a value equalling at least $1,000 a head was the gist of the action in the District Court (Complaint, I, Par. 7, Rec. 4; Complaint, II, Par. 3, Rec. 6), and the Federal rules imperatively required a finding on the issue. Dalehite v. United States, 346 U. S. 15, 24 (note); Maher v. Hendrickson (CA-7), 188 F. 2d 700, 702; Ohlinger v. United States (CA-9), 219 F. 2d 310, 311; Skelly Oil Co. v. Holloway (CA-8), 171 F. 2d 671, 673. The District Court did not make the finding, and this was one of the grounds of Wick's appeal to the Court of Appeals. The ground was ignored, as stated above.

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The premises, considered, petitioner Martin M. Wick prays that there be allowed a cross-writ of certiorari to review the judgment of the Court of Appeals for the Eighth Circuit in respect of the matters herein complained of.

Respectfully submitted,

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# APPENDIX.

(OPINION.)

United States Court of Appeals
For the Eighth Circuit.

No. 15,686

Martin M. Wick, Appellant,

vs.

Joseph Keshner, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[May 7, 1957.]

Emerson Baetz for Appellant.

Wilder Lucas and George A. Spencer (Ralph T. Finley was with them on the brief), for Appellee.

Before Gardner, Chief Judge, and Johnsen, Circuit Judge, and Donovan, District Judge.

Gardner, Chief Judge.

[1] This action was initiated by the filing of a complaint containing two counts. Appellant was plaintiff below and we shall refer to the parties as they were designated in the trial court. While the complaint contained two counts there was but one transaction involved and the counts of the complaint represent two versions of that transaction.

[2] By the first count plaintiff sought to recover damages in the amount of $30,000 based upon a breach of a duty

arising from a fiduciary relationship alleged to exist between the plaintiff and defendant. It was alleged that the defendant represented that he was engaged in the business of breeding, raising, buying and selling of beef cattle and other livestock and was a man of wide experience in his vocation and held himself out as an expert in the valuation, breeding, raising, buying and selling of beef cattle and other livestock; that plaintiff, on the other hand, was a pipe organ manufacturer without experience or knowledge in the business of breeding, raising, buying or selling of beef cattle or other livestock; that at the time mentioned in the complaint plaintiff and defendant discussed the possible investment of $15,000 by plaintiff in the business of beef cattle raising operated by defendant; that by way of inducement to such investment by plaintiff, defendant represented that if plaintiff would make such an investment he might realize a 25% per annum profit on such investment and that several other persons of wealth had made similar investments with him and that defendant was anxious to expand his clientele to include persons not engaged in agricultural pursuits; that defendant represented that in the event of such investment by the plaintiff defendant would either purchase animals for him or segregate animals from the defendant's herd and that thereafter defendant would keep, feed and maintain the animals, breeding them and crediting plaintiff with the progeny and that by reason of defendant's experience he was highly skilled in the art of buying and selling cattle and that by reason of his skill plaintiff's investment would be without risk of loss; that defendant represented that profit and income on such an investment would accrue to the investor when the herd allotted the investor reached thirty in number and that the cost of keeping, feeding, breeding and maintaining the animals allotted to an investor would not exceed $200 per year per head and that the initial expense of feeding and maintaining would be borne by defendant until the investment had attained a

profitable status and that defendant would have no obligation with respect to the physical keeping of the animals; that defendant represented that he was anxious to expand his clientele to the community of Highland, Illinois, where plaintiff resided, and that if plaintiff would invest with him defendant would personally allot to him at a price of $1,000 per head cattle of an actual value of $2,000 per head and would allot him cattle described as heifers and young matrons not over two years of age with pedigrees fully warranting the sum total of plaintiff's investment; that defendant represented that it was his uniform practice to offer to return to investors or purchasers such money invested or paid in the event of dissatisfaction on their part but that defendant had never experienced dissatisfaction on their part and had never been required to refund any money but that if plaintiff were at any time dissatisfied with his investment if made, defendant would refund his entire investment; that by reason of the statements and representations made to plaintiff by defendant plaintiff was induced to and did deliver and pay over to defendant the sum of $15,000 and defendant took, received and appropriated such sum; that notwithstanding the alleged confidential relationship existing between plaintiff and defendant, defendant failed to carry out and perform the representations and inducements made and did not exercise good faith in the use and employment of the money paid him by plaintiff in that initially the defendant failed and refused to allot any animals from his herds to the plaintiff and that upon the plaintiff's demand to be shown animals allotted to him the defendant segregated fifteen cows from his herds but that one was in excess of eleven years of age, one was in excess of nine years of age, four were in excess of eight years of age and three were in excess of seven years of age and that none had a pedigree or other characteristic which would make the average value of the allotted animals $2,000 per head or would make the total value of the allotted animals $15,000 to equal the amount

of money paid defendant by plaintiff; that the animals allotted to plaintiff were of a true and actual value not exceeding $300 per head; that upon learning the ages, characteristics and value of the animals allotted to him plaintiff demanded the return of his money, which demand the defendant refused and thereafter ordered plaintiff to remove from defendant's premises the animals allotted to plaintiff; that on the failure of plaintiff to remove the animals so allotted to him defendant billed plaintiff for feed, maintenance and breeding of the animals and upon plaintiff's failure to either remove the animals or pay the bills for feeding, maintenance and breeding defendant foreclosed his agister's lien resulting in the sale of the animals; that plaintiff had at no time acquiesced in the allotment of cattle made to him by defendant but had at all times repudiated it and demanded the return of his investment; that defendant did not intend to perform and comply with the representations made to plaintiff but, on the contrary, affirmatively intended not to perform and comply with such representations. Plaintiff then demanded judgment against defendant awarding him the return of the $15,000 paid to defendant by plaintiff and punitive damages in like amount.

[3] In the second count of his complaint plaintiff seeks to recover for breach of contract, alleging that he purchased from defendant fifteen cows for the agreed price of $15,000. He realleges the charges of fraud in the inducement, the payment of the $15,000 and the alleged agreement to refund such money at any time in the event of plaintiff's dissatisfaction. It is then alleged that in reliance on these representations plaintiff paid to defendant the agreed purchase price but that defendant in disregard of his obligations under the said contract of sale delayed in allotting any animals from his herd to plaintiff and that when he did allot them none of the cows had a value of $2,000 as agreed nor did the total value of the animals purchased amount to $15,000 but that the actual value of

the animals did not exceed $300 per head, which defendant well knew. Plaintiff therefore charged defendant with a breach of his contract from which he allegedly suffered $15,000 in damages, being the amount invested, and then realleged the charges of fraud as alleged in Count I of his complaint and asked for $15,000 additional punitive damages.

[4] By way of answer defendant denied all allegations of fraud or misrepresentation on his part, denied that the relations of the parties were confidential, admitted that he sold plaintiff fifteen head of cows at the agreed price of $15,000 and admitted that plaintiff had paid him the purchase price therefor, but denied that there was any agreement to refund plaintiff the purchase price if he should become dissatisfied with his bargain. Defendant also admitted that he agreed that he would keep plaintiff's cattle at $200 per year per head and feed, breed and maintain them until plaintiff could move them. Defendant affirmatively alleged that after the sale had occurred and the cows had given birth to calves the cows and calves were registered by defendant for plaintiff in plaintiff's name with the American Aberdeen Angus Association. Defendant further alleged that after a drop had occurred in the price of cattle in September of 1952 plaintiff requested his money back which defendant refused to give him; that after defendant had furnished plaintiff with the registration certificates of the cattle he asked plaintiff whether or not he wished to sell the calves that had been born to these cows as he had a purchaser for them who would pay from $250 to $300 per calf, but that plaintiff would not agree to that nor did he return the registration certificates on the calves so that they could be sold. Defendant further alleged that after plaintiff demanded return of the purchase price paid for said cattle defendant repeatedly billed plaintiff for breeding, keeping, maintaining and feeding the fifteen cows and their progeny, which demands being

declined defendant finally sued plaintiff to foreclose defendant's agister's lien against the fifteen cows and their progeny and in such proceeding recovered judgment in partial satisfaction of which the catttle were sold.

[5] The answer to the second count, in substance, alleged that there was a sale of fifteen cows for $1,000 apiece, realleged substantially all of the matters set forth in answer to Count I of plaintiff's complaint and denied the confidential relationship between plaintiff and defendant and the allegations of purported representations made by defendant to plaintiff to induce plaintiff to enter into the contract.

[6] The two causes of action were not pleaded in the alternative but so far as appears from the pleadings plaintiff was seeking to recover money judgments aggregating $60,000. There was no motion to require plaintiff to elect on which cause of action he would proceed. The action was tried to the court without a jury. It appeared from the evidence that at all times pertinent to the issues plaintiff was a man in his thirties and manager of a pipe organ manufacturing enterprise in Highland, Illinois. The defendant, a somewhat older man, operated a stock farm devoted to the breeding, raising, selling and maintenance of Aberdeen-Angus cattle near New Florence, Missouri. The plaintiff and defendant became acquainted through a young lady, one Mary Lou O'Haran, who was one of plaintiff's employees, and in the early part of 1952 the plaintiff, defendant and Miss O'Haran made a trip to Oklahoma to attend a sale of Angus cattle and at the sale purchased an Angus cow for $3,000, each of the three furnishing $1,000 of the purchase price. During the course of the trip it developed that the plaintiff, for the purpose of investment, was interested in buying some Angus cattle. Several days after the trip to Oklahoma the plaintiff went over to defendant's farm and purchased fifteen Angus

cows from defendant for $15,000, which plaintiff paid at that time. Mary Lou O'Haran was with the plaintiff at the defendant's farm when the purchase was made.

[7] At that time the defendant pointed out to plaintiff the cattle that he was purchasing, indicating that they had on double neck chains. By agreement between the parties the cattle were left on the defendant's farm and the defendant was to board them for an indefinite period of time at a reasonable rental not to exceed $200 per year per cow for which he was to be paid by the plaintiff at least once every six months or a year. Plaintiff had little knowledge of cattle, Angus bred or otherwise.

[8] Between February 9 and September 20, 1952, the plaintiff made several trips to defendant's farm to look at his cattle, usually in company with Miss O'Haran. The testimony also shows that shortly after the transaction in question defendant took a trip to Hawaii and that not long after his return the fifteen cows in question were registered with the American Aberdeen Angus Breeders Association in the name of plaintiff and that several calves that had been born to said cows were also registered in plaintiff's name. On September 20, 1952, defendant conducted one of his cattle sales which the plaintiff attended. After this sale at the defendant's farm the plaintiff also attended a cattle sale at or near Columbia, Missouri, and one near Kansas City, Missouri. Following these cattle sales the plaintiff concluded that the cattle he had purchased were not worth what he had paid for them, that the defendant had misrepresented the facts to him and he asked the defendant to return his $15,000, which the defendant refused.

[9] Following some correspondence and conversation between the parties defendant finally ordered plaintiff to remove his cattle from defendant's farm, which the plaintiff refused to do, and thereupon defendant made a demand against plaintiff for some $6,000 for feed and breeding

purposes which plaintiff refused to pay. Thereafter, defendant filed suit for an agister's lien upon which he was given judgment for $6,231.50 by a magistrate in Montgomery County, Missouri. The fifteen cows and their fourteen calves were then sold by the sheriff for $6,650 at an execution sale and after the costs and fees, totaling $838.50 were paid, the defendant received $5,811.50 on his judgment. There was no written contract between the parties. The facts will be further developed in the course of this opinion.

[10] On the evidence produced the court found the issues in favor of defendant so far as the causes of action pleaded were concerned, but found upon the evidence admitted without dispute that plaintiff was entitled to recover $3,111.50. The court specifically found, in effect, that the parties at all times pertinent to the issues here involved were dealing at arm's length and that no fiduciary relationship existed between them and that plaintiff did not turn over to defendant the sum of $15,000 or any other sum for investment as contended by him; but that plaintiff purchased fifteen Angus cows for $15,000 and gave defendant a check for same; that Mary Lou O'Haran, an employee of plaintiff, was with plaintiff at defendant's farm the day of the sale and that Miss O'Haran resided on a farm near Highland, Illinois, and began buying Aberdeen-Angus cattle in 1950 and at the time of trial owned six females, a bull and several calves of the Aberdeen-Angus breed; that "the defendant did not guarantee to the plaintiff that he would have a 25% return on his investment and that the investment would be without risk"; that "The defendant did not represent to plaintiff that the initial costs of boarding the cattle would be carried on by the defendant until the investment had attained a profitable status by reason of the production of progeny and the sale thereof"; and that "The defendant did not represent that the 15 cattle he would sell the plaintiff were

worth $2,000 per head, but that he would sell them to plaintiff for $1,000 per head." The findings will be further developed in the course of this opinion.

[11] On the findings the court concluded as a matter of law that plaintiff was not entitled to recover on the causes of action pleaded in his complaint but, as heretofore noted, entered judgment for plaintiff in the sum of $3,111.50. From the judgment so entered plaintiff has appealed and seeks reversal on substantially the following grounds: (1) the court erred in concluding as a matter of law that no fiduciary relationship existed between plaintiff and defendant; (2) the court erred in not concluding as a matter of law that the fiduciary relationship existing between plaintiff and defendant prohibited defendant from allotting to plaintiff cattle of a reasonable value less than the amount paid defendant by plaintiff, (3) the court erred in failing to find that the cattle allotted to plaintiff by defendant were of a reasonable value less than the amount paid defendant by plaintiff, and that defendant knew they were of such value, and (4) the court erred in not finding that regardless of whether there was a fiduciary relationship between the parties there was a breach of contract by defendant in allotting cattle not reasonably worth the money paid him by plaintiff.

[12] In the final analysis it is clear that plaintiff bottoms his right to recover on the alleged fact that there existed between the plaintiff and defendant a fiduciary relationship which required defendant to act with the utmost good faith towards the plaintiff and not to overreach him for defendant's benefit. The short answer to this contention would seem to be that the court found that no such relationship existed between plaintiff and defendant and that in the transaction here involved they acted at arm's length. This finding is, of course, presumptively correct and should not be set aside unless clearly erroneous. Rule 52 (a), Federal Rules of Civil Procedure. It is, however, urged by

plaintiff that this finding is not sustained by the evidence. It is not our purpose to restate the evidence on this question in detail. Though it may be somewhat repetitious, we observe that the evidence shows that plaintiff was a successful business man, the head and owner of a manufacfacturing company and a man of substantial means and business experience who could afford to and did fly his own airplane around the country. His interest in the cattle business, as previously stated, was aroused not by the defendant, but by his employee, Miss O'Haran, who had purchased from the defendant two pure-bred Angus cows at $1,000 a head in 1950 and who attended numerous sales of pure-bred Angus cattle where these were shown. She had taken leave from her work to attend one of the cattle sales in Texas in 1951 and plaintiff discussed with her before and after her departure the buying of Angus cattle. Plaintiff went to the International Show in the Fall of 1951. Miss O'Haran was then keeping Angus cattle which she owned on her father's farm. This young woman's mother introduced defendant to plaintiff at this International Show in Chicago and plaintiff expressed his interest in cattle at that time to defendant. Early in 1952 it appeared that plaintiff, defendant and Miss O'Haran attended two sales in Oklahoma, each buying a third interest in an Angus cow costing $3,000, and cattle were discussed, resulting in an offer by defendant to sell plaintiff fifteen head of pure-bred Angus cattle at $1,000 a head. The transaction, however, was not closed at that time, but plaintiff returned to defendant's farm on February 9, 1952, and again took with him Miss O'Haran in whom he had great confidence as to her knowledge of pure-bred Angus cattle. In other words, plaintiff was not relying only upon what defendant might tell him about the cattle he was buying. By the time plaintiff purchased the cattle he had attended, according to the record in this case, three showings and sales of pure-bred Angus cattle, including the International Show in Chicago. Miss O'Haran

accompanied plaintiff when defendant pointed out to plaintiff the cattle he was intending to sell him. Plaintiff was looking for an investment of surplus funds. He had the advise and counsel of his trusted employee, Miss O'Haran, who had experience in the purchase and maintenance of Angus cattle. Defendant did not seek out the plaintiff and attempt to sell him Angus cattle. The cattle in question were accessible and visible to the plaintiff and his advisor and there was no effort to prevent plaintiff from thoroughly inspecting the quality of the cattle and ascertaining their market value.

[13] To entitle plaintiff to recover not only must it be made to appear that he in fact relied upon the alleged misrepresentations of the seller, that he had a right to rely thereon, and that he was induced thereby to make the purchase, but it is generally held that where the buyer has an opportunity equal to that of the seller to investigate and ascertain the truth or falsity of the seller's representations with respect to the property, he has no right to rely upon the representations and cannot, in the absence of actual fraud on the part of the seller, avail himself of them. As said in **Dickinson v. Bankers Life & Casualty Company**, Mo., 283 S. W. 2d 658, cited with approval in **Woolfolk v. Jack Kennedy Chevrolet Company**, Mo., 296 S. W. 2d 511:

> "The law affords to every one a reasonable protection against fraud in dealing, but it is not an indulgent guardian which can go to the romantic length of giving protection against the consequence of indolence, folly or careless indifference to the ordinary and accessible means of information."

[14] The court in the instant case therefore correctly held that no relationship of confidence or trust arose as a result of the dealings between plaintiff and defendant.

[15] The suggestion that defendant selected the animals the plaintiff was buying is not borne out by the rec-

ord. The record discloses that defendant merely pointed out which of the cattle he in fact owned which were the subject of the sale. This was necessary because other cattle in the herd belonged to other parties and no one else present had sufficient knowledge to point out which of the cattle were the subject of sale. Where, as here, the parties dealt at arm's length defendant might properly commend the property he was selling without being guilty of fraud or misrepresentations. This is commonly accepted as trade talk, seller's statements or puffing, and a statement as to value is universally held to be a representation as to which the doctrine of caveat emptor applies. It must also be borne in mind that there was testimony that the cattle purchased by plaintiff were worth $1,000 per head and the court specifically found that the proof did not establish that the catle were not worth that amount and on this issue the burden of proof was on the plaintiff.

[16] Plaintiff in his complaint charged the defendant with various alleged misstatements of fact and various alleged fraudulent acts and testified to such statements and acts. As to these it is significant that the court on conflicting evidence specifically and categorically found in favor of defendant. This is illustrated by the following findings:

"14): * * * the defendant did not guarantee to the plaintiff that he would have a 25% return on his investment and that the investment would be without risk.

"15): The defendant did not represent to plaintiff that the initial costs of boarding the cattle would be carried on by the defendant until the investment had attained a profitable status by reason of the production of progeny and the sale thereof.

"16): The defendant did not represent that the 15 cattle he would sell the plaintiff were worth $2,000

per head, but that he would sell them to plaintiff for $1,000 per head."

[17] We are convinced that in finding in favor of defendant and against the plaintiff on the two causes of action set out in plaintiff's complaint the court committed no prejudicial error and the judgment in that regard is therefore affirmed.

[18] It remains to consider the contention of defendant that the judgment in favor of plaintiff for $3,111.50 is unwarranted and void. Defendant is the appellee and he took no appeal from any part of the judgment. He was the successful litigant so far as the two causes of action pleaded in plaintiff's complaint are concerned. Not having filed a cross-appeal he cannot be heard to question the legality of the judgment as entered, nor can he allege error in its entry. **Peoria Ry. Co. v. United States**, 263 U. S. 528; **Devine v. Zimmerman**, 8 Cir., 133 F. 2d 850; **United States Fidelity & Guaranty Co. v. Sweeney**, 8 Cir., 80 F. 2d 235; **Blackhurst v. Johnson**, 8 Cir., 72 F. 2d 644; **Barnsdall Refining Corp. v. Cushman-Wilson Oil Co.**, 97 F. 2d 481. In **Peoria Ry. Co. v. United States**, supra the court said:

> "The appellees can be heard before this Court only in support of the decree which was rendered."

[19] In **Devine v. Zimmerman**, supra, the appellees attemped to urge error in the dismissal of their complaint. In denying their right so to do we said, inter alia:

> "In passing it should be observed that plaintiffs also complain of this action of the court in dismissing their complaint, but not having appealed they cannot be heard to complain of the judgment as entered."

[20] The same rule was announced by this court in all the above cited cases. Thus, in **United States Fidelity & Guaranty Co. v. Sweeney**, supra, we said:

"Ordinarily, an appellee who files no cross-appeal is bound by the judgment as entered."

[21] And in **Blackhurst v. Johnson,** supra, in referring to the right of an appellee who has not filed a cross-appeal to urge error we said:

"She has, however, not appealed, and questions decided adversely to a party who has not appealed will not be considered on appeal. Appellees can be heard only in support of the decree which was rendered."

[22] We therefore pretermit any consideration of the grounds urged by defendant in support of his contention as the matter is not properly before us. The judgment as entered is presumptively correct and even if the part of the judgment now complained of by defendant were vulnerable to attack had he filed a cross-appeal on the ground that it was not warranted by the pleadings we might still, in support of the judgment, assume that the pleadings had been amended to conform with the proof admitted in evidence without objection. The judgment here complained of must therefore be sustained. It results that the judgment as entered is affirmed in its entirety.